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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO.

NEW ORLEANS STEAMSHIP ASSOCIATION,

Petitioner

VERSUS

GEORGE WILLIAMS, ET AL

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Can an appellate court avoid the "clearly erroneous" standard of Rule 52, Fed. R. Civ. P., by characterizing as legal rather than factual a trial court's finding that the work performed by the complainant class could not be segmented for purposes of Title VII analysis?

2.(a) Can a reviewing court that reverses a trial court's finding because of what the reviewing court characterizes as a legal error then refuse to remand for factual determinations under the correct legal standard?

(b) Is the question of discriminatory intent in a Title VII disparate treatment case a question of fact to be decided by a trial court; and, if it is, can a Court of Appeals substitute itself as the fact finder on this critical issue?

3. Can unidentified individuals not named as party plaintiffs serve as adequate class representatives under Rule 23, Fed. R. Civ. P.?

PARTIES TO THE PROCEEDING

New Orleans Steamship Association
Atlantic and Gulf Stevedores, Inc.
Cooper Stevedoring of Louisiana, Inc.
Dixie Stevedores, Inc.
J.P. Florio and Co., Inc.
Gulf Stevedore Corporation
Louisiana Stevedores, Inc.
Lykes Bros. Steamship Co., Inc.
Mid-Gulf Stevedores, Inc.
New Orleans Stevedoring Company
Rogers Terminal and Shipping Corporation
Ryan-Walsh Stevedoring Co., Inc.
T. Smith & Son, Inc.
Southern Stevedoring Company
Strachan Shipping Company
United States Stevedore Corporation
J. Young & Company, Inc.
The International Longshore Association (I.L.A.)
General Longshore Workers, Local Union No. 3000 (I.L.A.)
Sacksewers, Sweepers, Waterboys and Coopers Union, Local Union No. 1802 (I.L.A.)
George James Williams
Duralph S. Hayes
Ernest W. Turner, Jr.
Mathew D. Richard
John T. Aaron

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

1. Can an appellate court avoid the "clearly erroneous" standard of Rule 52, Fed. R. Civ. P., by characterizing as legal rather than factual a trial court's finding that the work performed by the complainant class could not be segmented for purposes of Title VII analysis? i

2. (a) Can a reviewing court that reverses a trial court's finding because of what the reviewing court characterizes as a legal error then refuse to remand for factual determinations under the correct legal standard? i

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3. Can unidentified individuals not named as party plaintiffs serve as adequate class representatives under Rule 23, Fed. R. Civ. P.? i

PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES ..... vi-vii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 2
JURISDICTION 2
STATEMENT OF THE CASE 2

History of the Litigation and Course of Proceedings 2

Facts Material to the Questions Presented 7

REASONS FOR GRANTING THE WRIT 12

I. THE COURT OF APPEALS AVOIDED REVIEW UNDER THE "CLEARLY ERRONEOUS" STANDARD BY MISCHARACTERIZING AS A LEGAL CONCLUSION THE TRIAL COURT'S FACTUAL DETERMINATION THAT WORK IN GRAIN COULD NOT BE SEGMENTED FROM OTHER PREFERRED LONGSHORE WORK, WHICH DETERMINATION WAS MADE IN CONFORMITY WITH PLAINTIFFS' STRUCTURE OF THEIR CLASS CLAIM TO PREFERRED WORK 13

II. THE COURT OF APPEALS FOLLOWING REVERSAL FOR LEGAL ERROR, REFUSED TO REMAND FOR FACT FINDING ON THE DISTINCTIVENESS OF WORK IN GRAIN AND TO REMAND FOR FINDINGS ON DISCRIMINATORY INTENT, ENGAGING IN INDEPENDENT FACTFINDING ON THESE SUBJECTS, CONTRARY TO "THE USUAL RULE" AND TO *PULLMAN-STANDARD V. SWINT*, 102 S.Ct. 1781 (1982) 17

III. THE COURT OF APPEALS HAS DIRECTED CERTIFICATION OF A CLASS IN WHICH NONE OF THE NAMED PARTY PLAINTIFFS PROVED THAT THEY WERE MEMBERS, OR THAT THEY SHARED THE COMPLAINTS OR INTERESTS OF THE PUTATIVE CLASS MEMBERS, THE COURT RELYING INSTEAD UPON UNNAMED LONGSHOREMEN WHO MIGHT SERVE AS ADEQUATE CLASS

REPRESENTATIVES, ALL IN CONTRAVENTION OF RULE 23 FED. R. CIV. P. AND RECENT DECISIONS OF THIS COURT 24

CONCLUSION 28

TABLES OF AUTHORITIES

Page

Arlington Heights v. Metropolitan Housing Dev. Corp.
429 U.S. 252 (1977) 22

Corder v. Kirksey
585 F.2d 708 (5th Cir. 1978) 20

DeMarco v. United States
415 U.S. 449, 450 (1974) 18

East Texas Motor Freight v. Rodriguez
431 U.S. 395 (1977) 12-13, 27

Echols v. Sullivan
521 F.2d 206 (5th Cir. 1975) 20

Eilers v. Boatman
111 U.S. 356 (1884) 15

General Tel. Co. v. Falcon
102 S.Ct. 2364 (1982) 12, 27

International Brotherhood of Teamsters v. United States
431 U.S. 324, 335 n.15 (1977) 21

Kelly v. So. Pacific Co.
419 U.S. 318, 332 (1974) 22

McDonnell Douglas Corp. v. Green
411 U.S. 792 (1973) 21

Pullman-Standard, Inc. v. Swint
102 S.Ct. 1781 (1982) 7, 12, 13, 17, 19, 21

Texas Department of Community Affairs v. Burdine
450 U.S. 248 (1981) 22

United States v. Gypsum Co.
333 U.S. 364 (1948) 16

United States v. Singer Mfg. Co.
374 U.S. 174 (1963) 16

Williams, et al v. New Orleans Steamship Association, et al
466 F.Supp. 662 (E.D. La. 1979), aff'd in part and rev'd in part, 673 F.2d. 742 (5th Cir. 1982), rehearing denied, 688 F.2d. 412 (5th Cir. 1982) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, New Orleans Steamship Association, respectfully petitions for a Writ of Certiorari to review the April 9, 1982 and the October 8, 1982 decisions of the United States Court of Appeals for the Fifth Circuit in the subject case.

OPINIONS BELOW

The April 9, 1982 opinion of the United States Court of Appeals for the Fifth Circuit in *Williams, et al v. New Orleans Steamship Association, et al,* No. 80-3886 is reported at 673 F.2d 742 (1982). Petition for Rehearing and Suggestion of En Banc Consideration on Rehearing was denied in an opinion reported at 688 F.2d 412 (1982). The opinion of the United States District Court for the Eastern District of Louisiana that was affirmed in part and reversed in part by the Court of Appeals is reported at 466 F.Supp. 662 (E.D. La. 1979).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) to review a decision dated April 9, 1982. Petition for Rehearing and Suggestion of En Banc Consideration on Rehearing were denied October 8, 1982.

STATEMENT OF THE CASE

History of the Litigation and Course of Proceedings.

This case, a broad, sweeping civil rights class action charging across-the-board race discrimination under 42 U.S.C. § 2000e, *et seq* and 42 U.S.C. § 1981, was filed more than ten years ago. Five named plaintiffs proceeded to trial in 1974 as individual claimants and as representatives of a class of several thousand longshoremen in the Port of New Orleans. The complainant class was proposed and defined by plaintiffs in the Pre-Trial Order as:

"(1) All black general longshore workers;

(2) All black longshoremen working in the craft composed of sweepers, coopers, waterboys, and sacksewers;

(3) All black foremen including general long-

> shore workers who obtain work from time to time as non-regular foremen."

Defendants were the New Orleans Steamship Association (hereinafter "NOSSA"), various of its members who employed longshore labor in two riverfront crafts, the International Longshoremen's Association and four I.L.A. local labor unions who represented that labor and bargained on their behalf with NOSSA.

Class claims lodged by the plaintiffs in their pretrial, trial and finally in their posttrial submissions to the District Court included a generalized charge of discrimination in the assignment of " . . .preferred or higher paying work". Counsel for plaintiff in his opening statement noted:

> "We allege, and we intend to prove that certain companies discriminate against Black longshoremen by completely excluding them from certain preferential higher-paying work . . .one clear example of this is the carpentry work . . .Another *example* is the so-called grain gangs. (Emphasis supplied) (T-20)

Trial began in July and concluded September 20, 1974. At trial the plaintiffs sought to prove their charges on assignment of "preferred" longshore work through testimony and the introduction of exhibits. The trial court did not at any time, by any ruling or otherwise, prevent plaintiffs from trying to prove discrimination in assignment to longshore grain work, or to any other kind of "preferred" longshore work standing alone.[1] No witness, however, testified that he had been denied longshore work in grain. Furthermore, plaintiffs' exhibits on earnings by the class at individual defendant companies did not separate earnings while working in grain from earnings resulting from all other types of longshore work.

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[1] Comment by the Court of Appeals on rehearing, pg. 3-F, (Appendix F) notwithstanding.

Finally in plaintiffs' Proposed Findings of Fact and Conclusions of Law after trial, they asked the Court to rule in their favor on a class claim described as "Racial Discrimination in Preferred Work Assignments." Under that heading plaintiffs grouped assignments of longshoremen to grain work, carpentry work, LASH/SEABEE gangs and deck jobs in integrated general cargo gangs.

In fact, all parties to the litigation, and the District Judge, addressed the subject of preferential longshore employment opportunities as a whole, without focusing upon or distinguishing one type of such work to the exclusion of another type of such work, in recognition of the unusual mobility of individual longshoremen between employers and also between different types of longshore work. This mobility was established through testimony that (1) longshoremen are hired anew each day (T-334); (2) longshoremen need not work if they choose otherwise (T-824-5, 2058-9, etc.); and (3) longshoremen are able to choose what company and type of cargo they will work (T-340, 502, 1826), without the impediment of ordinary seniority restrictions (T-1441).

On February 14, 1979 the trial court entered its decision in favor of the defendant employers with respect to every claim by the plaintiffs. In particular, the District Court:

(1) found no discrimination in preferred work assignments as alleged by the plaintiffs, stating that "...there are too many variables in the longshore industry..." to find a "...broad pattern or practice of racial discrimination..." in preferred work assignments, citing as one factual underpinning for this conclusion:

> "...the nature of the work, in that individual employees are not compelled to work every day and many can earn a decent living by working premium hours only when they want to; [and that] ...those who do work regularly can achieve maximum earnings and work hours by a willing-

ness to work additional hours to earn premium pay; . . ." (Appendix A, pg. 28-A).

(2) vacated its earlier ruling on a Port-wide class of black longshoremen, finding that the class as defined by the plaintiffs (once persons having antagonistic interests were excluded) lacked the requisite numerosity *and* that there had been no proof of discriminatory action " . . .applicable to a specific group of employees similarly situated and generally acted upon by the defendants with respect to an applicable class." 466 F.Supp. 662, 672.

On June 4, 1979 plaintiffs filed a Motion for Reconsideration of the Grain Cargo Issue. This marked the first time that the plaintiffs separated a claim of discrimination in assignment to grain gangs from their general claim of discrimination in "Preferred Work Assignments." This Motion also found plaintiffs asking for a class different from that of "all black general longshore workers" which class they had been insisting upon and representing for the preceding eight years. Following briefing and oral argument the District Court issued an order dated June 30, 1980, denying plaintiffs late attempt to prove discrimination in this one segment of all longshore employment opportunities available to black longshoremen. The Court affirmed its earlier factual finding that the nature of longshore employment precluded segmentation:

"[Plaintiffs] conclude that because premiums of up to 40 cents an hour are paid for grain cargo work [In our decision, see p. 673, we found a 20 cent per hour premium for such work.], this clearly establishes economic loss to blacks as a result of the allocation on racial lines, regardless of the availability of longshore work at *regular rates*. However, this ignores the fact that there are premium rates for other types of work besides that for grain cargo. This includes special kinds of work, such as, meal-time, night work, weekends, damaged cargo, explosives, etc. And, as pointed out by the

> defendants, by not including them in the statistical picture, the possibility of an inaccurate distortion exists. We agree with defendants that plaintiffs were unable to show that the overall work allocation in the longshore industry was disproportionate or inequitable and we think that such a showing is crucial to prove racial discrimination. *No longshoreman works exclusively at one type of work. Since he may work various types of cargo at different hours in any given week, the important thing is how he fares overall.* . . .There is no indication that the grain clause and the 20 cent differential created an overall discriminatory effect on the amount of money earned by black longshoremen. We think that the evidence as a whole established that blacks in the longshore industry receive their proportionate share of work and pay according to their numbers." (Emphasis added) (Minute Entry dated June 30, 1980, Appendix B, pg. 4-B)

Judgment was entered by the District Court dismissing the action on the merits as to all defendants, except for ordering two mergers among the four defendant local I.L.A. unions. Plaintiffs filed a timely appeal on only a portion of one of the six class claims decided against them and in favor of the defendants.[2] The defendant I.L.A. labor unions did not appeal from the merger order.

On April 9, 1982 the Court of Appeals affirmed the District Court's ruling on one of the newly separated issues, i.e., assignment to deck jobs in integrated general cargo gangs, and reversed the District Court's ruling on the other separated issue, i.e., assignment of longshoremen to grain work. The Court of Appeals concluded that the District Court had not made a factual determination as to the distinctiveness or separ-

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[2] Plaintiffs appealed part of their "Preferred Work Assignments" claim, i.e., assignment to deck jobs in integrated general cargo gangs and assignment to grain work. There was no appeal from other parts of the "Preferred Work Assignments" claim.

ability of longshore work in grain. Without citation to the record, the Court of Appeals states that the District Court had presumed there was no distinctiveness, thereby precluding plaintiffs from adducing proof of discrimination in that part of preferred work and "transforming" plaintiffs' claim into an industry-wide claim. This latter action, as perceived by the Court of Appeals, was characterized as "legal" in nature by that same Court. Based on this characterization, the Court of Appeals then reviewed the District Court's decision without regard to the "clearly erroneous" standard, (1) reversed, (2) certified a class of black longshoremen eligible for grain work represented by unnamed longshoremen not parties to the lawsuit, and (3) entered a finding of "purposeful discrimination" on the assignment of grain work, directing the District Court on remand to "determine the appropriate relief."

Defendants protested the standard of review used by the Fifth Circuit, and its failure to remand, by filing a Petition for Rehearing and Suggestion of En Banc Consideration on Rehearing on May 28, 1982, citing the Court of Appeals to several misapprehensions and calling the Court's attention to the intervening decision of the Supreme Court of the United States in *Pullman-Standard, Inc. v. Swint,* 102 S.Ct. 1781 (1982). Over four months later the Court of Appeals issued a written opinion denying said Petition and Suggestion. (Appendix F).

Facts Material to the Questions Presented

The workplace of this employment discrimination suit includes the entire riverfront of the Port of New Orleans (the largest port, by tonnage, in the United States), which encompasses longshore facilities on the Mississippi River from the Gulf of Mexico upriver to the Port of Baton Rouge (Ascension-St. James Parish line). This is the geographical scope of collective bargaining agreements negotiated between NOSSA, acting on behalf of certain of its members, and the defendant I.L.A. local unions herein. The original employer defendants were thirty-one of NOSSA's sixty-three

members and associated companies, a major part, by both employment and payroll, of the maritime industry, the largest industry in the City of New Orleans.

This suit in its original form attacked employment practices within two I.L.A. crafts, i.e., the General Longshore Workers ("longshoremen") and the Sacksewers, Sweepers, Waterboys and Coopers ("waterboys"), under two collective bargaining agreements, and employment practices beyond those crafts (e.g., promotions into supervision). All of these charges over the past eleven years have been decided in favor of the employer defendants, save a portion of one such charge, assignment of longshoremen to work grain. This statement of material facts will focus on that subject.

Because of the large costs associated with idle seagoing vessels, stevedores (the primary employers of longshoremen) operate around-the-clock, seven days a week. Longshore gangs[3] are "shaped" (i.e. hired and formed) twice daily, at 7:00 a.m. and again at 4:30 p.m., the gangs being hired anew each day. However, the business that a stevedore may have on a given day or week fluctuates with the arrival and departure of ships. This is one reason why individual longshoremen work for many different stevedore employers, in many different kinds of longshore jobs, in the course of a year. This fluctuation and variation of available longshore work [e.g., from highly merchanized LASH (Lighter Aboard Ship) cargo to bagged goods; from heavy lift to bulk, etc.] is matched by an extraordinary variety in pay rates (e.g., straight time, double time meal hours, time and a half overtime for work on weekends or work at night, premiums for certain types of cargo, etc.).

Perhaps in part because of the variety in compen-

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[3] The most common longshore gang, a gang used to work general cargo was composed of sixteen longshoremen. Gangs used to work grain were composed of eight longshoremen. Gangs used on LASH/SEABEE vessels had thirty-six longshoremen. Gangs used for carpentry varied in size under the labor agreement. Gangs handling ore or rocks had six longshoremen per gang. Gangs handling heavy lifts employed twelve longshoremen. [NOSSA Ex. No. 12 (d)]

sation and available work, there is a striking absence of traditional employment ties between the individual longshoreman and the employing stevedore. Briefly stated, there is no rule forcing an individual longshoreman to work at any particular time, during any particular week, on any particular job or for any particular employer. This fact was repeated, over and over, at trial by witnesses for both the plaintiffs and the defendants:

> "This is a very casual industry, and these guys have got the flexibility, really, if they are going to work on a particular day; and if they decide they are going to work, who they are going to work for, and what they are going to do." Testimony of C. Hayden (T-1826)

> "Q: As a regular, you have a right to work in the gang?
> A: Right.
> Q: On the other hand you don't have any obligation to work tomorrow for some reason?
> A: Yes."
> Testimony of M. Richard (T-336)

This fact was adopted by counsel for plaintiffs:

> " . . .the longshore industry in this case is unique, . . .on Title VII cases, because each individual person really has a choice, to some extent, about whether he is going to work on a particular day." Statement of R. Seymour (T-2841)

This fact was expressly recognized by the District Court:

> "No longshoreman works exclusively at one type of work. . . .he may work various types of cargo at different hours in any given week . . ." (Appendix B, pg. 4-B)

A relative degree of stabilization within the framework of casual employment, has been achieved

by the registration of veteran longshoremen as "G" longshoremen under the NOSSA-I.L.A. longshore Deep Sea Agreements.[4] This registration evolved to the point where in contract year 1972-73 (i.e., October 1 through September 30) registered longshoremen worked 98.68% of all longshore hours. The racial profile of longshoremen registered as "G" men in 1973 and 1974 showed a predominate black 3:1 ratio, (Pre-Trial Order A-28).[5] All parties at trial agreed that the relevant labor market for class purposes, when litigating employment opportunities across the riverfront, would be the registered work force.

The value of registration lies in the priority for available work. "G" men were, and are, given first preference for all available work, i.e., filling openings[6] in longshore gangs regardless of the type of work to be performed. Note however that registration does not require that an individual report for work with regularity. The individual's preference as to particular kinds of work, as admitted by plaintiffs' own witnesses (R-340, 502), continues to govern. Many longshore gangs have been designated by stevedores as "regular gangs". Stevedores promote versatility by such gangs, as noted in their cumulative testimony at trial, e.g.,

> "In my company right now I have five house gangs that are qualified to work any type cargo, and one is equal to the other." Testimony of R. Doll, New Orleans Stevedoring Company. (T-2128)

Only "G" registered longshoremen under the Deep Sea

[4] "G" longshoremen are guaranteed an individual minimum annual compensation, provided they accept any and all available longshore work, i.e., general cargo, LASH/SEABEE, bulk, grain, carpentry, etc.

[5] In considering this top-heavy black ratio it is not amiss to remember the relevant labor market from which these employees were drawn, i.e., the New Orleans urbanized area, which in 1970 had a racial population of 67.6% white persons and 32.4% non-white persons.

[6] Because as noted *supra* there is nothing to compel attendance by gang members, daily absenteeism and gang openings are a common occurrence on the riverfront. NOSSA Ex. 92 to 92-134.

Agreement may be selected by the foreman to work in regular gangs.[7] But while a foreman must include a regular gang member in the regular gang if the gang member makes himself available, the gang member has no obligation to appear and work every time his regular gang is ordered out by a stevedore. In fact, there are strong incentives for an individual longshoreman to choose to work only in certain time periods, as opposed to others, i.e., the liberal overtime rules governing employment of longshore labor under the NOSSA-I.L.A. collective bargaining agreement referred to *supra*. Those overtime rules provide that pay at time and a half will be paid to workers for all hours worked between 5:00 p.m. and 8:00 a.m. on any weekday, and for all hours worked on weekends and holidays. Thus, on a typical day there occur many openings that gang foremen must fill. These are filled by hiring other available longshoremen whose gangs are not working, or who choose to work elsewhere that particular day.

As an illustration of the mobility of "G" men under the Agreement: a regular gang member can decline to work at any time with his gang, and choose instead to work in a friend's gang for another stevedore, filling one of the openings caused by other longshoremen doing the same thing, because of personal whim, a desire for overtime earnings or any other reason. The absence of the first gang member, of course, creates an opportunity that will cause yet another absence, etc.

Among the types of longshore work described as "preferential" by plaintiffs is work in grain. Under the Deep Sea Agreements prior to October 1, 1974 assignment of longshoremen to the eight man gangs working grain was to be equally divided so far as "practical" between members of Local No. 1418 (mostly white in membership) and members of Local No. 1419 (mostly black in membership). The clause providing for such division of the work dated from the 1950's and as found

[7] It was proved at trial that the class of black longshoremen held 81% of all regular gang positions (NOSSA Ex. 23) - more than their proportionate share considering the 3:1 black-white ratio among "G" longshoremen.

by the District Court (466 F.Supp. 662, 673) was inserted in the contract(s) at the insistence of the leadership of the black I.L.A. local union because of impending reductions in gang size. The clause was deleted in negotiations that led to the 1974-77 Deep Sea Agreement.

In 1973 there were seventeen regular gangs designated for grain work (eight longshoremen to a gang) working for the defendant stevedores. Work in grain carried a $.20 per hour straight time premium (representing 3% of the regular longshore straight time rate of pay). At trial the President of the predominantly black local union testified that the grain work issue was "a drop in the bucket" (T-1609) when considering the whole of longshore work.

Reasons for Granting the Writ

The Fifth Circuit utilized an improper standard of review, avoiding the "clearly erroneous" test of Rule 52, by plainly mischaracterizing as "legal" the trial court's factual findings that work in grain was not distinctive from other preferred work available to longshoremen, thereby resurrecting in yet another manner the notion of *de novo* appellate review in civil rights litigation contrary to the recent admonitions of this Court in *Pullman-Standard v. Swint,* 102 S.Ct. 1781, (1982), *mutatis mutandis.*

Assuming, as did the Fifth Circuit, that the District Court made an erroneous *"legal"* determination, the Fifth Circuit's reversal of tne District Court without remand for a determination (1) whether work in grain was factually distinctive, and (2) if, assuming distinctiveness, whether there was "purposeful" or intentional discrimination in grain gang employment, is error and is in direct conflict with this Court's holding in *Pullman-Standard, supra.*

Finally the Fifth Circuit in stark conflict with the ruling of *General Tel. Co. v. Falcon, 102 S.Ct. 2364 (1982)* and *East Texas Motor Freight v. Rodriguez,* 431

U.S. 395 (1977) certified a complainant class by determining that unnamed longshoremen, not party to the lawsuit, ..."*can* serve as adequate class representatives...(Emphasis supplied)" *contra*, Rule 23 (a), Fed. R. Civ. P.

I.

THE COURT OF APPEALS AVOIDED REVIEW UNDER THE "CLEARLY ERRONEOUS" STANDARD BY MISCHARACTERIZING AS A LEGAL CONCLUSION THE TRIAL COURT'S FACTUAL DETERMINATION THAT WORK IN GRAIN COULD NOT BE SEGMENTED FROM OTHER PREFERRED LONGSHORE WORK, WHICH DETERMINATION WAS MADE IN CONFORMITY WITH PLAINTIFFS' STRUCTURE OF THEIR CLASS CLAIM TO PREFERRED WORK.

Whether unfettered appellate review of civil rights cases is achieved by the Fifth Circuit through differentiation of facts to be reviewed, i.e. "subsidiary" versus "ultimate",[8] or through blandly characterizing as "legal" what are clearly factual findings, the result *and the error* are the same.

The pivotal ruling in the trial court's decision here was one wherein the District Court accepted the plaintiffs' definition of preferred work as including all longshore work whether in grain, carpentry, LASH/SEABEE or in integrated general cargo gangs (Plaintiffs' and Plaintiff-Intervenors' Proposed Findings of Fact and Conclusions of Law, pg. 9-24). The District Court refused to find on plaintiffs' evidence a "...pattern or practice of racial discrimination..." in "...preferred work assignments, i.e. longshoremen assigned to grain cargo, waterboys for grain cargo crews, carpentry work and assignments to LASH vessels and deck jobs in 'integrated' general cargo crews..." (Appendix A, pg. 28-A). The Court noted as support for its conclusion:

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[8] An approach soundly rejected by this Court in *Pullman-Standard v. Swint*, 102 S.Ct. 1781 (1982).

"We do not think that the disparities in the statistical analysis presented by the plaintiffs is sufficient to serve as the basis for a conclusion that racial discrimination is being practiced. We think that there are *too many variables* in the longshore industry as constituted in the Port of New Orleans which are not encompassed by statistics. These have been pointed out by the unions as including (1) the nature of the work, in that individual employees are not compelled to work every day and many can earn a decent living by working premium hours only when they want to; (2) even those who do work regularly can achieve maximum earnings and work hours by a willingness to work additional hours to earn premium pay; (3) a certain amount of skill at working certain cargoes or performing certain tasks is subjectively taken into account by superintendents when hiring foremen and their gangs; (4) it is difficult to calculate the effect of the large number of casuals who drift into and out of work on the waterfront on racial distribution of the work."

(Appendix A, pg. 27-28-A) (Emphasis added)

Following this ruling, plaintiffs sought a separate, and post-trial, decision on one part of what they had earlier combined with all "preferred work", i.e., work in grain. By Minute Entry dated June 30, 1980 the District Court reiterated its earlier ruling of no discrimination, affirming its treatment of preferred work as one unitary subject, and making further findings in declining plaintiffs' post-trial plea for segmentation of longshore work opportunities:

"No longshoreman works exclusively at one type of work. Since he may work various types of cargo at different hours in any given week, the important thing is how he fares overall . . .There is no

> indication that the grain clause and the 20 cent differential created an overall discriminatory effect on the amount of money earned by black longshoremen. We think the evidence as a whole established that blacks in the longshore industry receive their proportionate share of work and pay according to their numbers. (Appendix B, pg. 4-B)

In sum, the District Court initially ruled in February of 1979 in favor of defendants on all preferred work taken as a whole, just as that claim was structured by the plaintiffs. Thereafter in June of 1980, on the occasion of plaintiffs' restructuring their claim to preferred work, the Court ruled again, refusing to segment a portion of work available to all longshoremen, because it determined *as a matter of fact* that the extremely casual nature of the employment relationship and the existence of a multiplicity of wage rates made such a segmentation unrealistic and impractical.

The Court of Appeals, after a passing nod to the Fifth Circuit's "ultimate fact" theory of appellate review in civil rights cases (discredited by the Supreme Court three weeks later), proceeded to review the findings of the trial court as though the refusal to segment work in grain was the result of a legal conclusion. This "conclusion" was described in the Court of Appeal's opinion denying rehearing as:

> "...an erroneous view of the law concerning the legal validity of segmented claims."
>
> * * *
>
> "...the decision of the district judge that the law required that the issue of discrimination in grain work not be separately cognizable." (Appendix F, pg. 3-F)

Fortunately, as noted by the Supreme Court almost a hundred years ago, an appellate court's characterization of a trial court's fact finding as a conclusion of law is not binding upon the United States Supreme Court. *Eilers v. Boatmen*, 111 U.S. 356 (1884).

It is impossible to state too strongly how alien this appellate ruling is to the record of the six week trial herein, to the actions of the District Judge, and to the position of the plaintiffs from 1971 to the date that the Fifth Circuit ruled in their favor. With all due respect, it is as though the appellate panel reviewed a record other than the one made by the parties below.

At no time did the plaintiffs seek to introduce evidence or to structure their case on the question of preferred work assignments in any way different from the way that it was presented to the District Court at the close of trial; at no time did the District Court deny the plaintiffs an opportunity to present evidence or argument on the question of preferred work assignments; nor is there any support in the record or in the decision below that the District Judge considered the plaintiffs barred by law from segmenting part of their preferred work assigment claim. To illustrate, plaintiffs listed by name twenty possible witnesses,[9] but chose to call only eleven of its twenty witnesses to the stand during the six week trial. At no time did the District Court stop the plaintiffs from calling those persons, additional witnesses or presenting further evidence on any of their class claims.[10] In fact, plaintiffs, with permission of the Court, called to the stand four witnesses whom they did not list in the Pretrial Order.

The District Court drew proper inferences from documentary evidence and other undisputed evidence. These inferences are properly reviewed only under the "clearly erroneous" standard of Rule 52. *United States v. Gypsum Co.*, 333 U.S. 364 (1948) and *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963).

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[9] One witness, who was not called for unknown reasons, was William Alexander, a person whom plaintiffs claimed would testify as to the "...hiring of grain gangs." The soundest explanation for Alexander's failure to testify is that no one at trial — including the plaintiffs — sought to segment work in grain from other preferred work, or to qualify a subclass of longshoremen working grain.

[10] *Contra* comments by the Court of Appeals in their review. See 673 F.2d 742 at 748 (n.9) (Appendix E), and 688 F.2d 412 at 416 (Appendix F).

In the District Court's trial decision (Appendix A), there was no dispute between the parties or differences in the form of the evidence, as to the nature of the claim presented: i.e., discrimination in assignment of preferred longshore work. The Court ruled on that issue as requested and supported its treatment of the preferred work issue by factual findings on the extremely casual nature of the industry. In the District Court's later ruling on work in grain it affirmed the trial decision, drawing further and specific inferences from fact findings that are a matter of record in the case, e.g. the mobility of class members which renders meaningless evidence as to economic advantages in one part of longshore work.

The Court of Appeals has not reviewed these findings under Rule 52, but rather has engaged in de novo review, thereby ruling in contradiction to Supreme Court precedent as found in *Gypsum Co.*, and *Singer, supra,* and in violation of the sense of the Supreme Court's recent decision on *Pullman-Standard, supra.* Reversal on this ground alone is required.

II.

THE COURT OF APPEALS FOLLOWING REVERSAL FOR LEGAL ERROR, REFUSED TO REMAND FOR FACT FINDING ON THE DISTINCTIVENESS OF WORK IN GRAIN AND TO REMAND FOR FINDINGS ON DISCRIMINATORY INTENT, ENGAGING IN INDEPENDENT FACT FINDING ON THESE SUBJECTS, CONTRARY TO "THE USUAL RULE" AND TO *PULLMAN-STANDARD V. SWINT,* 102 S.Ct. 1781 (1982).

Reversal of the District Court under the guise of legal error is but one half of the Court of Appeals' error in this case. The other half rises from its usurpation of the fact-finder function by determining on appeal two important facts necessary to the plaintiffs' case.

The first such fact the appellate court determined

was that longshore work in grain was sufficiently distinct to permit segmentation or separate treatment. Such a finding is clearly factual as admitted by the Court:

> "Petitioners contend that the inquiry into whether a job category constitutes an entity with distinct and separate characteristics is a question of fact. We are in full agreement with this assertion." (Appendix F, pg. 4-F)

The Court goes on to state that the trial court made no findings on this question, clearing the way for disregard of Rule 52:

> "The district court never addressed the issue of whether grain work was factually a distinct and separate category." (Appendix F, pg. 3-F)

Assuming for purposes of argument that this is correct, a remand would ordinarily be directed for findings on the distinctiveness of longshore work in grain. This is *exactly* what the Supreme Court noted in *Pullman-Standard, supra.*

> "When an appellate court discerns that a district court *has failed to make a finding* because of an erroneous view of the law, *the usual rule* is that there should be a remand for further proceedings to permit the trial court to make the missing findings:
>
> > 'Fact finding is the basic responsibility of district courts, rather than appellate courts, and . . .the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.' *DeMarco v. United States*, 415 U.S. 449, 450 (1974)."
>
> *Pullman-Standard, supra,* at 1791 (Emphasis added)

But the Court of Appeals does not mention this avenue, and rather sub silentio proceeds to decide that

work in grain is sufficiently distinct to justify separate analysis under Title VII.

> "The tasks performed by grain workers differ from those performed by other longshoremen because of the nature of the cargo involved. Furthermore, the Locals and NOSSA traditionally have treated grain work separately from other types of longshore work, as evidenced by the Deep Sea Agreement. The hourly wage paid for grain work is negotiated separately from other types of work. The mode of allocating jobs evenly between the black and white Locals was also unique to grain work. Thus, while longshoremen can and do perform a variety of jobs, the distinctiveness of grain work makes plaintiffs' claim of discrimination in this one area of employment viable under Title VII and § 1981." (Appendix E, pg. 8-E)

There is no support cited by the appellate court for their conclusions that "tasks performed by grain workers differ," or that there has been a traditional separate treatment of grain work in the Deep Sea Agreement, or that the "hourly wage paid for grain work is negotiated separately," or that job allocations in grain were unique. There is no indication that the panel knew, or took into consideration, such things as the similarity of longshore tasks when working bulk cargo and grain, the payment of premiums for working cargoes other than grain, the allocation of gang positions in other longshore work, etc. The weakness of the Court of Appeals' fact finding on this crucial point is *exactly* the reason that remands are "the usual rule." *Pullman-Standard, supra,* at 1791. 5A J. Moore & J. Lucas, *Moore's Federal Pracatice* § 52.06[2] (1982).

Here the Court of Appeals unmistakably concluded what the Supreme Court specifically postulated to be grounds for remand, i.e., that the "...district court has failed to make a finding because of an erroneous view of the law...". It is grave error for the

Court of Appeals to then try, on a cold and extremely voluminous record, to make the alleged missing finding. This Court of Appeals has in similar civil rights litigation followed the "usual rule" and directed remand so that the trial court might find the facts specially . . ." and thereby satisfy Rule 52(a).*Corder v. Kirksey,* 585 F.2d 708 (5th Cir. 1978) and *Echols v. Sullivan,* 521 F.2d 206 (5th Cir. 1975). There is no reason for the Court of Appeals' apparent departure from its earlier precedent and the recent ruling of this Court on this subject in *Pullman-Standard, supra.* In fact there is a dramatic reason for remand on the question of segmentation of work opportunities in grain. The Court of Appeals chastised the District Court for "misconstruing" plaintiffs' allegations (p. 746), "transforming" plaintiffs' claim on work in grain (p. 746) and for "ignoring plaintiffs' claim and creating one of its own (p. 749, n.9)." This legal error, according to the Court of Appeals, resulted in trial of a claim of industry-wide discrimination. It follows that if the Court of Appeals is correct, then the evidentiary record below would not be adequate or complete on the question of the distinctiveness, or nondistinctiveness, of work in grain. After all, the Court of Appeals divined that the trial court has " . . .converted the [plaintiffs'] claim [on grain work] into one of industry-wide discrimination . . ." and further that the trial court then "never addressed" the factual question of segmentation. Having arrived at such a conclusion, it is blatantly inconsistent for the Court of Appeals to deny remand so that further evidence may be taken and specific fact findings entered on the question of segmentation.

In addition to the threshold factual determination on whether work in grain can be segmented, there is the second essential fact finding in these proceedings, i.e., discriminatory intent. The Court of Appeals also decided this question without remand.

Plaintiffs' suit charges unlawful employment practices under § 703(a) of the Civil Rights Act of 1964 and § 1 of the Civil Rights Act of 1866. On the issue of

preferred work, plaintiffs claim a violation through class-wide disparate treatment. To prove a prima facie case of illegal "disparate treatment" this Court has consistently required proof of "discriminatory motive" or intent, noting that such proof is "critical." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The question of "discriminatory motive" or intent under the Civil Rights Act is clearly a factual question.

> ". . .whether the differential impact of the seniority system reflected an intent to discriminate on account of race. That question, as we see it, is a pure question of fact, subject to Rule 52's clearly erroneous standard.
>
> * * *
>
> Treating issues of intent as factual matters for the trier of fact is commonplace."
>
> *Pullman-Standard, supra*, at 1789, 1790

The Court of Appeals here answered this "pure question of fact" in favor of plaintiffs, determining that on the record before it, "discriminatory intent" existed in assignment of work in grain. The Court relied upon certain statistical evidence and a contract clause dividing the work between two local I.L.A. Unions as support for its finding of "intent." (pg. 750) The Court denied a subsequent request for remand by concluding in its decision on NOSSA's Petition for Rehearing ". . .-there was only one possible resolution of the issue. . .[and] remand on that issue would be a waste of time (Appendix F, pg. 7-F)." The latter reference is to a portion of the *Pullman-Standard* decision wherein it was stated:

> "Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard, supra*, at 1791

But here the District Court did not make (or refuse to make) a finding on "discriminatory intent" because of an "erroneous view of the law." The legal error, according to the Court of Appeals, was in the District Court's refusal to allow segmentation of preferred work claims. Under that construction of the case, the District Court obviously never addressed the question of "intent" in assignment of longshoremen to work in grain. There were no findings - "infirm" or otherwise - and accordingly the Court of Appeals should have remanded on the issue of "intent." As noted by the Supreme Court in a case cited with approval in *Pullman-Standard, supra:*

> "...the best course at this point is to require the trier of fact to re-examine the record in light of the proper legal standard."
>
> *Kelly v. So. Pacific Co.*, 419 U.S. 318, 332 (1974)

But even if the District Court had specifically refused to find "intent" in asssignments to grain work because of "an erroneous view of the law," the Court of Appeals could not conclude there was "only one possible resolution of the issue" without ignoring clear Supreme Court precedent. The Court of Appeals in making that assertion did not, and perhaps could not on the record before it, consider all of the factors denoted by this Court as guidance for triers of fact on the question of intent in disparate treatment cases. In *Teamsters, supra,* at 335, n.15, while discussing "intent," the Supreme Court gave as an example its earlier decision in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). That decision refers a trial court that is trying a question of "intent" to such things as (1) proportionate impact of the practice or action, (2) historical background of the decision, (3) departures from normal procedure, and (4) legislative or administrative history. The Court of Appeals in this case looked only to current differential impact. It ignored such critical and relevant factors as the genesis of the practice (e.g., who proposed such a division of

work, and why?) and its evolution over earlier decades (e.g., was the contract clause discussed in subsequent negotiations, and if so, what were those discussions?). The Court of Appeals refused to consider evidence as to how assignment to grain work fit into the overall practices on the riverfront in assigning work to longshoremen, stating in a classic *non sequitur* that if this point was fallacious on the question of segmentation, it was equally unworthy on the factual issue of "intent." Appendix E, pg. 15-E. Considering the few factors analyzed, it is small wonder the Court of Appeals would conclude " . . .there was only one possible resolution." That Court would not have been so categorical if they had followed the guidance of the Supreme Court as set forth in *Arlington Heights* and considered all factors relevant to the issue.[11] If the Court of Appeals had followed that course of analysis, as indeed it should have, then remand for findings in these areas would have been the certain and correct result.

Finally, it is respectfully submitted that the refusal to remand on the question of "intent" is in direct conflict with the holding of the Supreme Court in *Pullman-Standard, supra.* In that case the Court clearly and unequivocally reversed the Fifth Circuit, directing remand for § 703(h) findings based upon the "differential impact" of a seniority system. Here the same Court of Appeals is finding "intent" under § 703(a) based upon differential impact of a collective bargaining agreement clause on assignment of work. The Court of Appeals is the same; the appellate underpinning for a finding of "intent" is the same; the result in this honorable Court should also be the same: reversal and remand.

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[11] It is interesting to note that the Court of Appeals was not quite so categorical in its earlier opinion:

"Because so many of the factors determining work patterns are not within the employer's control, and in fact are determined by the employees, it is more difficult to attribute statistical imbalances to a discriminatory motive on the part of the employers." (Appendix E, pg. 16-E)

In sum, the refusal of the Court of Appeals to remand, opting instead for its own fact finding on the question of job distinctiveness and discriminatory intent, directly conflicts with prior precedent of the Supreme Court, as most recently enunciated in *Pullman-Standard, supra.*

III.

THE COURT OF APPEALS HAS DIRECTED CERTIFICATION OF A CLASS IN WHICH NONE OF THE NAMED PARTY PLAINTIFFS PROVED THAT THEY WERE MEMBERS, OR THAT THEY SHARED THE COMPLAINTS OR INTERESTS OF THE PUTATIVE CLASS MEMBERS, THE COURT RELYING INSTEAD UPON UNNAMED LONGSHOREMEN WHO MIGHT SERVE AS ADEQUATE CLASS REPRESENTATIVES, ALL IN CONTRAVENTION OF RULE 23 FED. R. CIV. P. AND RECENT DECISIONS OF THIS COURT.

The class of complainants in this litigation has been (1) certified, (2) decertified, and (3) recertified during a period of eleven years and in two forums. As noted earlier, the District Court prior to, and during trial, accepted the plaintiffs' argument that they represented under Rule 23(a), *inter alia,* a class of "All black longshore workers . . . ." Following trial and as part of its February 14, 1979 decision on the merits, the District Court reversed its earlier approval of a broad class, deciding that upon the evidence the proposed class of "All black longshore workers" was lacking in the requisite Rule 23(a) (1) "numerosity," and further that there was no proof of action by the defendants directed to a group of employees similarly situated [i.e., Rule 23 (b) (2)].

The Court of Appeals, in reversing the District Court's "legal" error of "converting" the plaintiffs' claim of discrimination in grain work into an industry-wide claim of discrimination, proceeded to certify a

new class of complainants, i.e., all registered black longshoremen who sought or were deterred from seeking grain work. This class is an outgrowth of the Court of Appeals' ruling on discriminatory job assignments to grain work, specifically, assignment of longshoremen to grain trimming gangs and/or hand trimming gangs, as those gangs were structured under Article VIII of the Deep Sea Agreements. These were eight man gangs in which work was to be divided so far as practicable "fifty-fifty" between members of I.L.A. Locals 1418 and 1419.

Defendants argued in support of the District Court's final ruling on the class that there had been no "adequate" representative under Rule 23 of a class of longshoremen looking for work in the eight man grain gangs. The Court of Appeals responded to this point in its first decision by noting:

> "The Pre-Trial Order, however, refutes this contention. At least one of the named plaintiffs claimed to be a victim of each type of discrimination alleged in this appeal." (Appendix E, pg. 24-E, n.20)

The "named plaintiff" alluded to by the Court of Appeals is John Aaron. Aaron, however, specifically disavowed in testimony any connection between his complaint and the eight-man grain gang that is the subject of the Fifth Circuit's remand. (T - 664-5)[12] This fact was called to the attention of the Court of Appeals in defendants' Petition for Rehearing.

The Court of Appeals, in apparent recognition of the weakness of pointing to Aaron as the representative of their new class, sought firmer ground and ended by saying:

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[12] Aaron may in fact have worked grain as one of the types of commodities carried in lighters, but that clearly would have been as a member of a LASH gang, and has nothing to do with work in or assignment to the eight-man gangs assigned to grain work.

> "It must be concluded that, *in a major sense,* the district court by its rulings cut off the development of specific testimony to isolate particular people as having engaged in grain work. The record is quite clear, *by implication however,* and indeed by the very argument which the plaintiffs make in trying to say that grain work is not separable, that many of the longshoremen at the New Orleans port have worked in grain gangs, and *can serve* as adequate class representatives of a class limited to challenging discrimination in grain work." (Appendix F, pg. 6-F) (Emphasis added)

The Court has apparently directed certification of a class for which no representative, adequate or otherwise, has appeared. The Court seems to be saying that since there must be such longshoremen "out there" — somewhere, certification of a class is required.

The Supreme Court has recently emphasized that in private civil rights class actions all of the requirements of Rule 23 must be satisfied. *General Tel. Co. v. Falcon,* 102 S.Ct. 2364 (1982). That case, coincidentally to the one at bar, revolved around the "adequacy of representative" requirement of Rule 23(a). There the Supreme Court reversed a class certification as overly broad, finding the plaintiff was not an "adequate" representative of absent parties whose claims differed from those of the plaintiff.

The decision of the Supreme Court in *East Texas Motor Freight v. Rodriguez,* 431 U.S. 395, 97 S.Ct. 1891 (1977), quoted with approval in *Falcon, supra,* is even more in point. There the Supreme Court reversed the Fifth Circuit who had certified a class on appeal (as that Court did in the present case), because:

> ". . .the named plaintiffs were not proper class representatives under Fed. Rule Civ. Proc. 23(a). In short the trial court proceedings made clear that Rodriguez, Perez and Herrera were not members of

> the class of discriminatees they purported to represent. As this Court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." p. 403

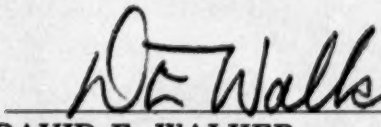
In the present case, the trial court proceedings also make clear that Williams, Hayes, Turner, Richard and Aaron are not members of the class confected by the Court of Appeals. Indeed, the Court of Appeals seems to implicitly acknowledge this in that it rather lamely refers to "many . . .longshoremen" who "can serve" as representatives. If this hypothetical approach to satisfying Rule 23 is allowed to stand, then the requirements of that Rule in civil rights litigation, as envisioned by Congress in its enactment of Title VII and the pronouncements of the Supreme Court most recently in *Falcon* and *East Texas Motor Freight, supra* will have been completely undercut. Because of the aforesaid conflicts with applicable decisions of the Supreme Court, a Writ of Certiorari must and should be granted.

CONCLUSION

A Writ of Certiorari must and should issue to the Court of Appeals for the Fifth Circuit in this case because the decision below reflects a clear and continued intention by that appellate court to serve as the fact finder in civil rights litigation. This is evidenced by the court's pontification on the proper standard of review, their entry of fact findings more properly the subject of remand, and the declaration of a complainant class without regard to the federal Rules. All of these features of the appellate decision taken singly, or as a whole, are at odds with recent and applicable decisions of this honorable Court.

Respectfully submitted this the 4 day of January, 1983.

WALKER & BORDELON

By: 

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ATTORNEYS FOR NEW ORLEANS STEAMSHIP ASSOCIATION

82-1129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO.

NEW ORLEANS STEAMSHIP ASSOCIATION,

Petitioner

VERSUS

GEORGE WILLIAMS, ET AL

Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

United States District Court
Eastern District of Louisiana

WILLIAMS, ET AL

VERSUS

NEW ORLEANS
STEAMSHIP ASSOCIATION, ET AL

CIVIL ACTION
NO. 71-873
SECTION "B"

February 14, 1979

HEEBE, Chief Judge:

Plaintiffs, George James Williams, Duralph S. Hayes and Ernest W. Turner, Jr., individually and on behalf of all others similarly situated, filed this suit against the New Orleans Steamship Association (NOSA) and twenty-nine of its member corporations, shipping, stevedoring and freight-handling companies operating in the Port of New Orleans, along with the International Longshoremen Association, Locals 1418 and 1419 General Longshore Workers, I.L.A., and Locals 1802 and 1683, Sacksewers, Sweepers, Waterboys and Coopers, I.L.A. Subsequently, Matthew D. Richard and John T. Aaron were permitted to intervene as plaintiffs, and three additional defendants, Louisiana Stevedores, Inc., Mid-Gulf Stevedores, Inc., and J. Young & Company, were joined. Plaintiffs alleged that the member companies of NOSA discriminated against them and members of the class they represent on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e—2(a). The allegations against the defendant Locals 1418 and 1419 of the General Longshore Workers, I.L.A., is that they are segregated by race, Local 1418 being virtually all white and Local 1419 all black. The same is allegedly true with respect to locals 1802 and 1683, the former being all white and the latter all black. It was specifically alleged that plaintiffs are affected by this segregation of the local unions because it provides one method by which preference in job assignment is given to white employees. The plaintiffs further alleged that the segregated locals had negotiated with NOSA for labor contract provisions which were inherently racially discriminatory. Plaintiffs seek a permanent injunction prohibiting NOSA and its member companies from violating 42 U.S.C. § 2000e—2. They also seek the issuance of a permanent injunction requiring defendant International Longshoremen Association and defendant locals to merge Locals 1683 and 1802 into one local and, also, Locals 1418 and 1419

into one local, with no further classification and segregation of membership on the basis of race.

An investigation, which resulted in a Report and Findings of the Department of Labor, dated July 1964, was conducted by the U.S. Department of Labor into the areas of manpower utilization and job security in the longshore industry in the Port of New Orleans. This study did not focus on the question of race. The study did reveal that historically employment in the longshore industry was on a casual and irregular basis. This was produced by a large surplus of labor in the longshore industry in New Orleans which, in turn, resulted in a total lack of job security in the Port. The figures which the study arrived at indicated that general cargo tonnage in the port of New Orleans, during the preceding seven-year period, ranged from a high of approximately 5.3 million tons in 1957 to a low of approximately 3.9 million tons in 1959. However, it was determined that the total number of hours worked annually by longshore employees during that seven-year period declined steadily. In the year 1962-63, total hours of employment had decreased by 27% below the 1956-57 work year. During that period, between 11,500 and 15,500 men were employed annually as longshore workers. However, the number of men hired on a weekly basis most frequently ranged between 6,000 and 6,200 employees, with a rare week providing work for 7,000 men. The obvious conclusion was that the total number of men in the workforce was almost double the number of jobs available in a normal workweek in the Port. There was no doubt that there existed an urgent need for the parties in New Orleans to develop a more stabilized workforce. The Report also noted that there was no seniority system in the Port of New Orleans and no formal attachment of men to companies that employed them. The only attachment was of men to the foreman who hired them into a gang and, therefore, they worked for their foreman and not for the company. (NOSA Exhibit # 13, "Report and Findings of the Department of Labor, dated July 1964.") Due in

large part to this Department of Labor study, a registration system was instituted which progressively stabilized employment in the Port.

The present nature and description of the resulting employment situation in the Port, which encompasses decasualization and institution of an employee registration system, is one agreed upon by all the parties, as evidenced by their Pre-trial Order. (Record, Document # 171.) Waterfront workers now employed in the Port of New Orleans are separated into various crafts and work under the jurisdiction of separate I.L.A. local unions. As stated above, this suit involves two of these crafts which are worked by waterfront workers: general longshoremen, working under the jurisdiction of Locals 1418 and 1419; sacksewers, sweepers, waterboys and coopers, working under the jurisdiction of Locals 1802 and 1683. At present, both of the above workforces are divided into categories consisting of: *"eligible employees,"* those who are eligible to participate in a "Guaranteed Annual Income" Plan (set out in Article XXVIII of NOSA's contract with the Locals) and who have first priority for employment as Category 1 employees and are issued cards known as "G Cards"; next, "G—O" men, Category 2, who are not covered by the "Guaranteed Annual Income" Plan but who have the same priority for employment as Category 1 men and are issued "G—O Cards"; third, "SG" men, who have a secondary priority for employment below the first two, are issued "SG Cards" and constitute Category 3; finally, casuals, made up of a constantly changing group of individuals, the great majority of whom apply for longshore work sporadically and who have no longshore identification cards. The first three categories described make up the "registered workforce," casuals not being among those registered. The foregoing is the classification system for longshoremen. The sacksewers, sweepers, waterboys and coopers are similarly classified in their workforce, the difference in terminology being of no importance as there exists the same types of categories with

the same types of priority.

Locals 1418 and 1419, together, and Locals 1683 and 1802, together, each enter into a single collective bargaining contract with NOSA, which represents most of the employers of waterfront labor in the Port of New Orleans. Local 1418 has an active membership of approximately 750, 744 of whom are white. Local 1419 has an active membership of approximately 3,608, of whom all are black. Local 1802 has an active membership of approximately 117, all of whom are white, and Local 1683 has an active membership of approximately 91, all of whom are black.

General longshore workers load and unload ships, among other duties. Hiring of all longshoremen by the various stevedores takes place now, and did in the past, in one central hall, the Waterfront Employment Center owned by NOSA. Longshoremen are organized into "gangs" for ship loading and unloading work, each gang being supervised by a foreman. The size of a gang depends on the type of cargo to be worked, with the minimum gang size being specified in NOSA's Agreement with Locals 1418 and 1419. Under the current Agreement, general cargo gangs must be at least 16 men; grain gangs which work bulk grain need a minimum of 8 men; other specialized gangs range in size from 6—with bulk ore—to 18—on LASH ship work; carpentry gangs are of no specified size. All pay rates for longshoremen are set out in the Deep Sea Agreement between NOSA and Locals 1418 and 1419 and vary under certain contractually designated circumstances. Longshore work is performed on a day-by-day basis, 7 days a week, with hiring done by the stevedoring companies at "shape ups" conducted twice a day at the Center, once in the morning and once in the afternoon. Some stevedoring companies use "regular" gangs to which they give preference on available work over non-regular gangs that may work for them from time to time. The company supervisor picks the foremen he wants to work for him, and the foremen hire their gangs. In a regular gang, the foreman is obliged

to hire available regular members of his gang for required available work before anyone else. If a company has more work than can be done on a particular day by its regular gangs, it may then hire non-regular gangs, which may be a gang that is regular with another company which has no work for it at that time. It may also be a gang which is assembled by a longshoreman who also works as a foremen when such work is available. The foremen and longshore gangs are assigned to ships by a company supervisor and then to individual hatches on the ship by a ship superintendent, also an employee of the company who is in overall charge of the work being done on the vessel for the company. With respect to the other unions, the waterboys are those workers who provide drinking water for a gang, some waterboys being regular with a company and attached to its regular gangs and others non-regular, the latter being generally hired in the same manner as non-regular longshoremen. Not every gang carries a single waterboy, as frequently two waterboys will service three gangs working a single ship. The hiring supervisor normally designates which foreman will be allowed to hire a waterboy.

In addition to the individual claims made by plaintiffs and plaintiffs-intervenors, the following are the "class claims," many of which purportedly encompass claims made by the individuals: (1) racial discrimination in employment of foremen in that various companies discriminate against black longshoremen in hiring regular foremen, in the hiring of non-regular foremen and in allotting less work to regular and/or non-regular black foremen than to white foremen; (2) racial discrimination against black longshoremen in the Waterboy-Sacksewer craft in the hiring of regular waterboys by major company-defendants and in allotting less work to them than to white waterboys; (3) racial discrimination in job assignment with general cargo gangs in that major company-defendants discriminate against black longshoremen by assigning a disproportionate number of them to hold work, while a disproportionate number of white longshoremen are

assigned to non-hold work; (4) racial discrimination in that various companies employ a disproportionately small number of black longshoremen for grain gangs; (5) racial discrimination against black longshoremen by employing a disproportionately small number of them in carpentry gangs; (6) racial discrimination in that various companies assigned a disproportionate amount of the most arduous and unpleasant work to all-black general cargo gangs; (7) racial discrimination in overall allotment of work to black longshoremen in that various companies assign a disproportionately small amount of their work to black longshoremen; (8) racial discrimination in that various companies exclude black longshoremen from employment as superintendents; (9) racial discrimination in employment on LASH gangs against black longshoremen by assigning to them a disproportionately small amount of such work. Of course, the final allegation of discrimination is against the I.L.A. and the defendant Locals as to black longshoremen, as a class, by maintaining dual, segregated locals.

The question first posed to this Court has been defined by plaintiffs as being not whether improvements have occurred in the Port of New Orleans for black longshoremen or whether some blacks have advanced, but whether vestiges and traditions of racial discrimination, which existed in years past, continue to taint waterfront employment practices. Plaintiffs no longer assert all of the separate claims of racial discrimination which they asserted in their Pre-trial Order and at trial. This is most true with respect to discrimination by defendant companies against blacks in longshore and craft 2 work. We think they could hardly assert that such discrimination was proved at trial. The racial composition of the "G" workforce as of June 10, 1974, was 2,078 black and 682 white, i.e., 75.3% black and 24.7% white. All parties agree that there has been a long-standing three-fourths majority of blacks among longshoremen. In the contract year 1969/70, there were more workers and blacks consti-

tuted slightly less than three fourths of the workforce—2,854 black longshoremen were registered under the NOSA/ILA Deep Sea Agreement and 994 white, for a percentage of 74.16 black and 25.83 white. In addition to the increase in the percentage of black longshoremen between 1969/70 and 1974, the distribution of longshore hours worked by black "G" longshoremen in the contract year of 1972/73 was 76.1% for blacks and 23.9% for whites. This translates into average annual income as follows:

COMPARISON OF HIGHEST EARNING
"G" LONGSHOREMEN BY RACE
Contract Year 1972/73
(from NOSA Exs. # 46-50)

	Race/	Average/ Hours	Average/ Earnings	Average/ Rate
100 Highest	Black	2,474.46	$19,369.48	$7.50
	White	2,318.03	17,140.10	$7.51
200 Highest	Black	2,298.46	17,117.55	7.28
	White	2,097.41	15,051.64	7.24
300 Highest	Black	2,193.71	15,935.24	7.15
	White	1,939.58	13,687.52	7.11
400 Highest	Black	2,123.70	15,154.17	7.05
	White	1,815.90	12,654.09	7.01
500 Highest	Black	2,062.98	14,561.67	6.99
	White	1,700.76	11,722.21	6.90
600 Highest	Black	1,968.67	13,672.46	6.90
	White	1,357.10	9,299.09	6.48

In considering the above chart, it should be kept in mind that there is a direct correlation between earnings and absenteeism, some individuals with a greater percentage of availability for work have earned slightly less than some employees with somewhat less hours worked, apparently due to the hourly rate for the type of work performed. The plaintiffs have now narrowed

their allegations of racial discrimination by the defendant-companies to the following: (1) racial discrimination in preferred work assignments, i.e., longshoremen assigned to grain cargo, waterboys for grain cargo crews, carpentry work and assignments to LASH vessels and deck jobs in "integrated" general cargo crews; (2) racial discrimination in the selection and assignment of supervisors, i.e., superintendents and foremen (regular, extra, and grain). Plaintiffs attribute virtually all of the overall wage, hour and rate differences which they allege is suffered by blacks in the workforce to discrimination in the allocation of grain cargo work. These are, of course, in addition to the charges of illegal maintenance of racial segregation of local unions and discrimination against individual plaintiffs and plaintiff-intervenors.

In addition to the described narrowing of the area of alleged discrimination to class discrimination in grain and other premium work, plaintiffs have reduced the original twenty-seven defendant-stevedoring companies on the New Orleans waterfront to the following fifteen, which allegedly discriminate against blacks in the defined manner: (1) Atlantic and Gulf Stevedores, Inc.; (2) Cooper Stevedoring of Louisiana, Inc.; (3) Dixie Stevedores, Inc.; (4) J.P. Florio & Company, Inc.; (5) Gulf Stevedore Corporation; (6) Louisiana Stevedores, Inc.; (7) Lykes Bros. Steamship Co., Inc.; (8) Mid-Gulf Stevedores, Inc.; (9) New Orleans Stevedoring Company; (10) Rogers Terminal and Shipping Corporation; (11) Ryan Stevedoring Company, Inc.; (12) T. Smith & Son, Inc.; (13) Strachan Shipping Company; (14) J. Young & Company, Inc.; (15) Southern Stevedoring Company. In order to prove their case, plaintiffs have undertaken the task of showing that each of these defendants discriminate in some particular though not necessarily identical way and that this individual discrimination then relates back to overall discrimination in the industry. This is somewhat of a departure from the position which plaintiffs took much earlier in the development of this

suit when this Court was persuaded by them that all of the companies that were members of NOSA should be treated as "integral parts of a conglomerate employer." Twelve of the named defendants filed a motion to dismiss for lack of jurisdiction on the basis that Title VII of the Civil Rights Act, 42 U.S.C. § 2000e—2(a), was inapplicable to them as § 2000e defined *employer* as one with 25 or more employees for each working day. (Record, Documents Nos. 17 and 26 [p.2].) They had filed affidavits to the effect that they employed less than that number. In defining NOSA as an integrated enterprise the plaintiffs pointed out that for employment purposes, the members of NOSA operated as one large employer which controlled employment on the waterfront and established uniform employment practices applicable to all member companies. They further made the observation that NOSA was the collective bargaining agent for all of these companies operating in the Port of New Orleans and, as such, *established uniform employment policies applicable to all member companies* which delegated this broad authority to it. In view of this position, the Court will consider whether its agreement with plaintiffs' earlier position on the issue of membership-employer identity should also apply to its determination of the issue of discrimination. The Court also points out, as did plaintiffs, that its findings and conclusions at this stage deal only with issues of liability and do not attempt to consider any possible remedies that may be necessitated by its decision herein.

Racial Discrimination as to Individual Plaintiffs

Plaintiff, George Williams, filed a charge of racial discrimination in employment against all defendants with the EEOC and, subsequently, received a notification of his right to institute suit in view of the inability of the EEOC to resolve the issue. This suit was filed on March 30, 1971. Williams filed a second charge with the EEOC against the defendants alleging retaliation

against him on account of the filing of suit. The Commission authorized him to sue on this charge on February 7, 1973. Williams is a black longshoreman who started work in the Port of New Orleans in 1956 as a longshoreman in general cargo gangs. He became a member of Local 1419 in that same year, *i.e.*, 1956. In June of 1965, Williams organized a general longshore gang and began attempting to get work as a foreman. He was never a regular foreman with any stevedoring company between the time he organized the gang in 1965 and the date he retired from the riverfront on November 30, 1971. In November of 1971, Williams developed an ulcer which rendered him physically unable to do longshore work and he retired on a pension. The Court does not feel that Williams carried his burden of proving that he did not become a regular foreman because of racial discrimination or that he received less work than whites as an "extra" foreman because of his race. There is no question in the Court's mind that Williams "hustled" as much as possible for foreman work, according to his own testimony and also by the fact that he did receive more than a modicum of such work. However, this Court concludes that the weight of the credible evidence indicates that Williams' failure to become a regular foreman was attributable to his poor or inadequate performance, based on a productivity and accident record which were consistently unacceptable to the defendant employers.

There is evidence in the record that quite a few of the defendant companies gave Williams a chance to work as a foreman. Strachan Shipping hired Williams approximately ten times as a foreman in 1969, and about four times in 1970. In 1969, he was warned of poor production on the job, and it was concluded that there was no improvement in 1970. At his request, he was given one other chance to work as a foreman in that year. This time he refused to follow advice given by the superintendent at Strachan, his work was found lacking and he ceased working for the company in 1970.

This problem of poor performance proved to be the same reason Williams did not receive more work from other defendant companies. He worked as a foreman off and on from 1969 to 1971 for Louisiana Stevedores, but the evidence indicates that he was inept and unconscientious about supervising his men. After one bad experience, Louisiana refused to hire him again. Williams also worked for United States Stevedores between 1965 and 1971 as a non-regular foreman. The criticism of him by this company was specific with respect to the fact that he was often not around and his gang often worked without adequate supervision because of his absence. In addition, he was not considered a good foreman there because of lack of control over his gang. Williams also worked sporadically for Lykes Brothers prior to February of 1970. At this time, Williams' gang experienced an accident while working one of Lykes' vessels. The accident was the result of improper rigging. There is much disputing evidence as to who was at fault for the dangerous manner of rigging. The daily work report for the day in question does indicate that Williams' gang rigged the hatch where the accident took place. Regardless of who was actually at fault, there is no question but that the company believed that a foreman of a gang was responsible for the rigging of a hatch and that Williams was responsible for the accident. As a result, instructions were given that he and his gang were not to be hired again *after* completion of work in that hatch, as contractually required. With respect to the six companies that Williams accused of not hiring him on racial grounds, the Court finds that all of them either by first-hand experience or by reputation were of the opinion that Williams' work showed poor performance.

We turn to plaintiff Duralph S. Hayes, a black waterfront worker and member of Local 1683, who filed a charge of racial discrimination against defendants T. Smith & Son, Inc., and Local 1802 on November 25, 1968, and received his "right to sue" letter from the EEOC on March 1, 1971. Hayes started work in the

Port as a waterboy in July 1960 and became a member of Local 1683 shortly thereafter. Hayes has alleged that from the early part of 1968, he was one of defendant T. Smith's four regular waterboys on the night shift. However, at the time of trial, Hayes was a cooper, one who repairs damaged cargo and does other work on the wharf, at United Brands. At the time in question, Hayes and three white waterboys were the regular night help. The three agreed among themselves to divide the work up so that all would get an equal amount of it as all four would not be sent out at the same time. There is some conflict, but the Court is of the opinion that this arrangement ended when one white waterboy refused to continue to participate in it. Hayes alleges that after this, The (sic) T. Smith superintendent showed preference for a white waterboy, one Hingle, and this constituted the racial discrimination. However, the evidence shows that for the second, third and fourth quarters of 1968, Hayes earned more or slightly less than Hingle in each period. Plaintiff Hayes has not carried his burden of proving discriminatory practices on the part of T. Smith. The Court can only conclude that he left T. Smith to begin working for United Brands as a cooper.

The third plaintiff, Ernest Turner, filed a charge of racial discrimination against defendant NOSA and all of its member companies on March 19, 1968, and received a "right to sue" letter from the EEOC on March 17, 1971. His chief reason for filing a charge against his "employer" was based on discrimination in hiring of black waterboys, most of whom were hired as extras. He correlates this discrimination to the method of hiring waterboys which denies him an equal amount of time, *i.e.*, the waterboys are hired by a foreman and black foremen are given less opportunity to hire their waterboys. The issue of discrimination appears to revolve around Turner's contenion that he was a regular waterboy. Turner filed his charge against New Orleans Stevedores with whom it is alleged by him, he started working regularly as a waterboy in June or

July of 1968. The evidence predominates that Turner, contrary to his belief, was not a regular waterboy for New Orleans Stevedores. At the time complained of, New Orleans had only four regular waterboys, two black and two white, and Turner was not one of them. One Charlie Roy, a black foreman with New Orleans did carry Turner as a waterboy but, as he testified, only as an *extra*. He further stated that most of the time when he needed Turner he could not find him. Turner subsequently told him that he was working as a regular waterboy for T. Smith. This appears to be the situation as it existed, and there are, therefore, no real grounds against New Orleans Stevedores which, at least, have been proven by Turner.

The plaintiff-intervenors are Matthew D. Richard and John T. Aaron, black longshoremen on the New Orleans waterfront who are members of Local 1419. On July 14, 1971, Richard filed a charge of racial discrimination against Gulf Stevedore corporation and later received a "right to sue" letter from the EEOC on April 27, 1973. From 1951 until 1970, Richard was a regular foreman of a regular general cargo gang at Gulf Stevedores. In 1951, Richard was in an all-black gang with a black foreman and at that time was asked to take over the foreman's job because the former foreman left. Richard alleged that initially he was treated well, but when the former vice president of the company left, the new vice president and hiring superintendent began to discriminate against him and his gang in work assignments as follows: (1) Richard and his gang got less work; (2) Richard and his gang got more than their share of work in the # 1 hold of ships, the hold where it is more difficult to move cargo, and in a similar but less difficult # 5 hold; (3) Richard and his gang were assigned to load and unload the most unpleasant hand-movable cargo. For reasons that are in dispute, Richard started losing gang members and his accident rate and lost man hours increased. Subsequently, in May 1971, he was discharged as a foreman by Gulf's vice president. Richard alleges that it was

racial discrimination against his gang in work assignments that led to his discharge. Defendants assert that Richard's termination was caused by his excessively high accident rate which was the highest of any of Gulf's foremen in terms of cost per man-hour work. This Court finds that it was, in fact, three times higher than the Gulf foreman with the next highest accident rate and was the result of thirteen accidents in his gang during the contract year 1969-70. There followed five more accidents between October 1970 and March 1971. It was the opinion of his superiors that this accident record was attributable to Richard's failure to personally hire his gang at the Center or to stay with them throughout the day. We are not convinced by plaintiff's theory that the type of cargo the gang worked was related to or the cause of the number of accidents. Neither do we agree with plaintiffs that one cannot correlate the amount of earnings of Richard as a foreman with the amount of work his men received because Richard was on a guarantee. Richard's earnings for 1969 and 1970 are higher than the average earnings of all regular foremen at Gulf Stevedores, and if all the other foremen were also on a guarantee, then Richard's gang would have received their fair share of Gulf work during these two years prior to his termination. We conclude that the reason for Richard's termination was his unacceptable safety record and that he has not carried his burden of proving otherwise, *i.e.*, that it was the result of racial descrimination.

John T. Aaron, the other plaintiff-intervenor, a black longshoreman who had worked as a regular on general cargo gangs, worked for Atlantic and Gulf in 1969 and 1970, and for Mid-Gulf Stevedores in 1970, 1971 and part of 1972. In November 1972, Aaron was discharged from the gang by its foreman. Regular gangs at Mid-Gulf were composed of a core of ten men who would always work if the gang was working, an additional three men who would work when a specific type of barge work was available and, lastly, five more men who were "regulars" on the gang only when the

gang was at its full complement of eighteen men. This occurred when the general cargo gangs worked LASH vessels (which refers to lighter aboard ship and means there is no heavy physical labor associated with LASH work), which Mid-Gulf serviced exclusively, in addition to other kinds of work that went along with it. Aaron was a regular on the eighteen-man gang only. Therfore, when Aaron was not working on a LASH ship, the only type which he was obligated to work, he would seek longshore work with another foreman. However, Aaron also worked for a construction company. After he was terminated, Aaron filed an EEOC charge in which he alleged that he "was fired from a regular grain crew in which [he] had been employed for over a year, because of [his] race." (Plaintiffs' Exhibit # 44.) Contrary to this allegation, this Court is convinced from the evidence that Aaron was discharged from the gang because of excessive absenteeism. In fact, the evidence indicates that Aaron's foreman complained to Mid-Gulf's general manager about the fact that he had not been available on a regular basis over a long period of time. On investigation, the general manager agreed with Aaron's foreman that Aaron should be dropped from the gang. On November 6, 1972, Aaron was replaced with a black longshoreman. On investigation of the matter by the vice president of Local 1419, it was determined that Aaron had been absent over 50% of the time he worked for Mid-Gulf. In fact, from April 1972 through October 1972 Aaron worked a total of 775 hours as an iron worker under the jurisdiction of the local Iron Workers Unions. The Court concludes that Aaron's termination was not motivated by racial discrimination and, further, that no other longshoreman in the same gang as Aaron had an absentee record as bad or worse than Aaron's during the critical seven-month period which was considered by those in authority in the decision to terminate Aaron. On the evidence, we are convinced that Aaron failed to prove that his discharge was the result of racial discrimination.

Class Action

This suit was filed by plaintiffs on behalf of themselves and "...all other persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure." Plaintiffs then set out, in Paragraph II of their Complaint, requirements of numerosity, the existence of issues of law and fact common to the class, fair and adequate representation by plaintiffs, claims and defenses of defendants typical of those of the class and a situation where defendants have refused to act on certain grounds applicable to plaintiffs and the class. By Minute Entry of January 18, 1972, this Court denied a motion to dismiss the class action filed by NOSA and the defendant employers. Subsequently, defendants filed a motion to dismiss the class action on certain issues, which the Court deferred ruling on until after the trial of the merits of the case, by Minute Entry dated July 18, 1974. Even if we had not done this, as stated in Wright & Miller, Federal Practice and Procedure: Civil § 1785, p. 137: "The court's initial decision under Rule 23(c)(1) that an action is maintainable on a class basis in fact may be the final resolution of the question, although it is not irreversible and may be altered or amended at a later date." Of course, the fact that we have held that the named plaintiffs have not proved their own Title VII claim does not mean that the class of employees they seek to represent are deprived of a remedy if it is appropriate. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Brown v. Gaston County Dyeing Machine Company*, 457 F.2d 1377, 1380 (4th Cir. 1972). However, we are convinced at this point that plaintiffs have not proved that they are entitled to maintain a class action under Rule 23(a) and (b)(2) in that the class lacks the requisite numerosity and, even if that were not the case, plaintiffs have not proved employment discrimination in the specific areas they have delineated which is applicable to a specific group of employees similarly situated and generally acted upon by the defendants

with respect to an applicable class.

Numerosity. In 1968, fifteen waterfront workers filed charges of racial discrimination with the EEOC against NOSA and some of its members, including fourteen of the remaining fifteen defendant stevedore companies in this suit. These charges attacked a broad range of employment practices alleged to be racially discriminatory. The EEOC consolidated the charges and undertook a year-and-a-half investigation which effectuated conciliation efforts that resulted in a formal Settlement Agreement (NOSA Exhibit # 7), on March 2, 1971. This Agreement obtained general as well as specific commitments from all defendant employers on the issues of nondiscriminatory practices and policies, covering many of the complaints involved in this case. Most differences involve the relief sought and not the substance of the charge. See, Minute Entry of January 18, 1972 (Record, Document # 39, p. 6). In addition, it established a reporting and monitoring procedure by the EEOC which would insure future compliance with the Agreement. The Settlement Agreement was ratified and signed by all of the riverfront companies charged with discrimination and by eleven of the charging parties, with the exception of the three plaintiffs in this suit, Williams, Turner and Hayes, and was also approved and executed by the EEOC. This Court is aware that in its Minute Entry of January 18, 1972, *supra,* it held that the Settlement Agreement could have no effect on the right of the individual plaintiffs to bring suit and also that the fact that the signatories to the Agreement constituted the majority of the charging parties did not mean that they were more representative of the class than the instant plaintiffs. However, having heard all of the evidence and having listened to plaintiffs' witnesses, the Court cannot now disregard the fact that eleven out of fourteen complainants were satisfied with their settlement with the defendant companies and plaintiffs have given no proof of any other group sufficiently large to warrant class action. Additionally, although we have

not been presented with an actual petition disclaiming class representation by the individual black members of Local 1419, we are aware that the majority of the members of Local 1419 do not wish to be represented as a class in the plaintiffs' efforts to integrate the dual unions. We conclude, as did the trial court in *Bailey v. Ryan Stevedoring Co., Inc.*, 528 F.2d 551, 553 (W.D. La. 1976), which involved similar issues in the Port of Baton Rouge, that " '[t]he facts of this case clearly establish that the claims of [the plaintiffs] are individual in nature and the issues raised by them are not issues common to any definable class too numerous to sue individually ...' " under Rule 23, F.R.Civ.P. Therefore, since our decision does not have any class application, any other rulings in this decision will have *res judicata* effect only as to the individual plaintiffs. *Roman v. ESB, Inc.*, 550 F.2d 1343, 1355 (4th Cir. 1976).

Employment Discrimination—Segregated Locals

Plaintiffs assert now, and previously on their motion for separate judgment on the issue of the maintenance of segregated local unions, that the maintenance of a substantially all white union and an all black union has an adverse effect on the employment opportunities of black longshoremen based, of course, on the fact that they outnumber white longshoremen by three to one and are not so treated. Plaintiffs further assert that even if the Court does not find employment discrimination, that the maintenance of segregated locals is a *per se* violation of Title VII of the Civil Rights Act.

As stated earlier in the Opinion, the areas of racial discrimination have been broken down by plaintiffs into two categories, with subdivisions under each. The first is racial discrimination in preferred work assignments and includes: (1) grain cargo gangs; (2) carpentry work; (3) LASH vessels—Mid-Gulf; (4) assignment of preferred deck jobs. The second is in the selection

and assignment of supervisors: (1) general and ship superintendents; (2) foremen, regular and extra and grain foremen. Before discussing these specific areas, there are two assumptions plaintiffs have made with which this Court is not in agreement. The first has been touched upon, *i.e.*, that each defendant employer is responsible for its own employment practices. If this had always been the plaintiffs' position, the Court would never have considered the members of NOSA an integral unit. However, we did so on the basis that they all followed the same employment practices dictated by NOSA. It is not certain, but in view of our ultimate decision in this area it may not be necessary to resolve this matter. However, if we have to, we think that our view of the industry, as will be set forth, precludes now an attempted showing of employment discrimination by scrutinizing the disparities in black and white employment by fifteen separate employers who purportedly discriminate in a variety of individual ways. The second point is that, with respect to some of plaintiffs' statistics, the figures are based solely on integrated gangs, without regard to gangs which are all black. Since plaintiffs argue that, even when the focus is expanded to include *all* gangs, the results are not changed significantly, we see no reason not to operate on an analysis of *all* regular gangs.

I. Racial Discrimination in Preferred Work Assignments

(1) Grain Cargo Gangs—Longshoremen

Apparently work in grain cargo is easier and better paying than other general longshore work, there being a 20 cent per hour premium for such work. Up to and during some of the trial of this suit, the Deep Sea Agreement between NOSA and Unions provided that: "So far as is practical, work is to be divided between members of ILA Locals 1418 and 1419 in grain trimming machine gangs, and/or hand trimming gangs." In practice, this meant that grain crews were to be half

white and half black, assuming that sufficient longshoremen of both races were available, even though the active black local membership was more than three times greater than that of the white. Plaintiffs argue that the clause was originally agreed to by the black union because of its concern that its members would receive even less than half of the grain cargo work as a result of discrimination by white foremen. However, according to our reading of the testimony of the President of Local 1419 at that time, Wilfred Daliet, whose testimony plaintiffs rely on, it was his understanding that the foremen, the majority of whom were white, did hire as equal a number of black and white for grain gangs as they could. But it was the former president of 1419 who insisted that the clause be inserted in the Deep Sea Agreement to protect his men and to see to it that they would get a "fair shake." The clause was continued in one form or another down to the current contract year of 1971-1974. However, on the expiration of that contract on September 30, 1974, it was determined that it would not be necessary to continue the grain clause into the next contract because of the strides made by blacks with respect to grain cargo work, including the addition of three black foremen in the grain industry in 1974. (Transcript, pp. 1572-77, Wilfred Dailet.) This is not to say that we disagree with plaintiffs' position that the division of grain cargo work was discriminatory and that it was accomplished through a segregated union system. We also cannot disagree with plaintiffs, on the facts, that the removal of the contract language was a tactic of this litigation and in response to the dictates of Title VII. We are not prepared, at this point, to say that this suit was not the catalyst for the removal of the clause.

(2) Grain Cargo Crews—Waterboys

In narrowing its areas of discrimination, the plaintiffs next look at the allocation of grain waterboy work, as opposed to blacks employed as regular water-

boys. They first point out that there is nothing in the waterboy contract concerning the allocation of grain waterboy work between members of the white and black locals as existed in the Deep Sea Agreement as to grain cargo crews. In spite of this, it seems to the Court that there must have been some impact from the 50-50 grain work division since, as previously described, there is not one waterboy for each gang. In addition, we think that this subdivision is just too insignificant in terms of the entire waterfront workforce to give much weight to plaintiffs' case. We prefer to look at the overall picture of waterboys at defendant companies. The evidence indicates the following for individual company defendants, the basis on which plaintiffs want to operate: during 1973, Cooper Stevedoring had two regular waterboys, one black earning $17,517 and one white earning $8,997; for the same period, Strachan Shipping had four regular waterboys, two blacks, one earning $19,614 and one $11,870, and two whites, one earning $8,915 and one earning $8,654; for the same year, J. Young & Company employed three waterboys, one black and two white, the black man earning more than either of the two whites; for the year, J.P. Florio employed three waterboys, one black who earned $10,641, one white who earned $7,841 and one white who earned $4,794; finally, for that year, Gulf Stevedores, employed two regular waterboys, on white who earned $4,949 and one black who earned $5,897. In addition to what the foregoing could indicate, that less blacks are working more hours than whites as regular waterboys, NOSA Exhibit # 24 shows that the regular waterboys used by defendant companies has been declining over the past years. In 1972 there were 29 black and 48 white, and in 1973 there were 27 black and 38 white, which indicates a substantially greater decrease of whites over the small decrease of blacks. Moreover, on an average basis during 1972 and 1973, earnings of regular waterboys were approximately the same for blacks and whites.

(3) Carpentry Work

Plaintiffs next focus on what they allege to be a pattern or practice of racial discrimination in the hiring of longshoremen to work in carpentry gangs. Carpentry work is used in connection with loading and unloading older ships in which supporting walls are constructed to hold cargo and also in the securing and lashing of cargo aboard vessels. It is uncontested that the use of carpenters has diminished in recent years and that in the past, defendant companies had traditionally assigned most carpentry work to whites. As a corollary, men working as members of the few remaining carpentry gangs all have very long employment records, many of which predate the effective date of the Civil Rights Act of 1964. Furthermore, there have been few additional openings in regular gangs due to the foregoing. The combination of seniority of long standing coupled with a decrease in the type of work does not lend itself to a finding of discrimination in hiring of black carpenters.

(4) LASH Vessels

The nature of LASH vessel work has previously been described. Defendants have shown that 83.7% of all LASH/seabee and container gangs employed by defendant employers is black, hardly indicative of racial discrimination. Plaintiffs, however, have focused solely on defendant Mid-Gulf which, as earlier pointed out, exclusively services LASH vessels. Plaintiffs assert that there was an agreement between the two locals and Mid-Gulf as to the division of LASH work between the two locals. However, as the court appreciates the evidence, Mid-Gulf was instructed by Local 1418 and Local 1419 to divide the work up on a 40-60 basis, respectively, between the two and Mid-Gulf complied with these instructions for about a year and a half, starting in 1968. The underlying reason for this was that both unions went on strike over the number of whites and blacks who would work LASH gangs, as it was obvious that LASH vessels would not require as

many longshoremen as the previous types of vessels. In 1971, Mid-Gulf advised the two unions that it would no longer apply this requested ratio and, at the time of trial, according to the testimony of the general manager of Mid-Gulf, the ratio of their gangs was about 72-28 or 75-25. The evidence further indicates that among five of the major defendant companies, Lykes Brothers, Mid-Gulf, J. Young, Atlantic & Gulf, T. Smith & Son, in the year 1972, the racial composition of LASH, seabee and container gangs was a total of 326 blacks and 61 whites for a percentage of 84.23 black and 15.76 white. In 1973, it was 405 blacks and 81 whites, a percentage of 83.7 black and 16.3 white. This also does not present a picture of racial discrimination in our view.

(5) Deck Jobs in General Cargo Crews

A general cargo crew is made up of sixteen members, of which eight men work in the ship's hold and the balance work on deck—at jobs such as derricksmen, pilemen, hook-on men, driver and winchmen. Deck jobs pay no higher than those in the hold, but they are considered preferable to the hold jobs in that they are less physically demanding. Plaintiffs contend that the twelve defendant companies that employ regular general cargo gangs discriminate against blacks in connection with assignment to preferred deck jobs. Once again, plaintiffs talk in terms of the number of blacks on the waterfront rather than the percentage of blacks holding these "preferred" jobs. The following is their statistical analysis:

Proportion of White and Black Members of All General Cargo Gangs Assigned to Deck Jobs, December 1973

	Number in all Regular General Cargo Gangs	Number in Deck Jobs	% in Deck Jobs
White	188	162	86.2%
Black	1,242	542	43.6%

However, if one looks at the overall picture presented by the major defendant companies during a five-year period, the view is not as bleak:

Number of Regular Gang Members by Race
In Deck and Wharf Jobs in Regular Company Gangs

Company	Gang Postion	March 1965		March 1970	
	Winchmen, Derricksmen, Hook-on Men Lift Operators, Pile Men	White	Black	White	Black
Atlantic & Gulf	"	31	57	53	106
Gulf	"	21	19	9	39
Louisiana Stevedores	"	21	27	24	44
N.O. Stevedoring	"	109	59	76	92
Florio	"	32	40	30	32
Lykes Bros.	"	64	61	39	72
Strachan Shipping	"	27	53	20	60
T. Smith & Son	"	84	189	52	214
Ryan Stevedoring	"	66	46	17	37

This table indicates a definite trend of a steady movement of black longshoremen into "preferred work" of deck and wharf jobs and, as the evidence shows, on the basis of gang longevity and individual ability to perform the work.

II. Racial Discrimination in the Selection and Assignment of Supervisors

Superintendents and Foremen

The superintendents constitute the level of supervision above foremen and their gangs. They hire the necessary foremen and their gangs each day and assign them to a particular ship. They are regular salaried company employees. The plaintiffs minimize the situation when they state that some overly industrious longshoremen and foremen make more money than superintendents, but that the latter's job has the advantages of regularity of income, status and authority.

Plaintiffs assert that ten of the defendant companies discriminate in the hiring of superintendents in that none of the companies has ever hired more than one black superintendent and only three had a black superintendent at the time of trial. There was evidence that a number of black foremen have been offered and refused jobs as superintendents since 1968. However, a comparison of 1973 average earnings of men who became superintendents since 1968 to the 1973 average of these black foremen indicates an average of $14,544.48 for superintendents to an average of $23,178.56 for foremen. Apparently, there is a greater desire to work for a larger amount of money than regularity of income, status and authority. Plaintiffs presented no evidence to rebut this conclusion.

With respect to foremen, plaintiffs contend that defendants Atlantic & Gulf, Dixie, J.P. Florio, Louisiana Stevedores, Lykes, Mid-Gulf, T. Smith and J. Young discriminate in the hiring of regular foremen. This is based on the fact that although the pool of longshoremen from which the regular foremen are selected is over 75% black, as of July 1974 blacks constituted 50% or less of the regular foremen of these companies. First, we reiterate that we are more interested in the trend in hiring of regular foremen in the entire industry as indicating whether there is a continuing pattern or practice of discrimination. The evidence indicates that the number of regular foremen by race of defendant companies in 1972 was 50 black and 93 white, in 1973 there were 68 black and 88 white. This indicates a constant increase in black foremen and a decrease in white. Earnings have also improved with black foremen earning an average of $11,575.44 in 1972 as compared to a white average earning in that same year of $12,225.27. In 1973, the evidence indicates that black foremen earned an average of $14,-975.25 to a white average earnings of $13,527.61. (NOSA Exhibits 84 and 85.) Additionally, as of June 1974, 50 blacks and 42 whites had become regular foremen with their companies since 1968. (NOSA Ex-

hibit # 89.) Once again, this indicates a discernable improvement for blacks and, from raw data, it is impossible to gauge the effect of seniority on this situation. The most encouraging thing is that blacks have been steadily increasing their proportionate share of regular foreman positions.

Plaintiffs also point to a number of companies that discriminate in the hiring of extra or non-regular foremen. These men are hired by a company when there is more work than can be done by the company's regular foremen and gangs. The list of these companies includes seven of the eight charged with discrimination in the hiring of regular foremen, with Dixie not being included, but adds three other companies to the list that discriminate in hiring non-regular foremen. Gulf, New Orleans Stevedores and Ryan. We agree with the defendants that there is no logic to the contention that some companies do not discriminate in the hiring of regular foremen, the more desirable job, but do discriminate in the hiring of non-regular foremen. And, furthermore, in most cases this discrimination is done by the same stevedore superintendent. We reject this aspect of plaintiffs' case out of hand.

The Court is aware of the fact that it is "...well established that courts must...examine statistics, patterns, practices and general policies to ascertain whether racial discrimination exists" in a particular industry under court scrutiny. *Brown v. Gaston County Dyeing Machine Company*, 457 F.2d 1377, 1382 (4th Cir. 1972), *citing United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 442 (5th Cir. 1971). However, when relying on statistics to make out a *prima facie* case for the plaintiffs, courts look for a large statistical imbalance plus a strong factual background of discrimination. *Roman v. ESB, Inc.*, 550 F.2d 1343, 1353 (4th Cir. 1976). We do not think that the disparities in the statistical analysis presented by the plaintiffs is sufficient to serve as the basis for a conclusion that racial discrimination is being practiced. We think that there are too many variables in the longshore industry

as constituted in the Port of New Orleans which are not encompassed by statistics. These have been pointed out by the unions as including (1) the nature of the work, in that individual employees are not compelled to work every day and many can earn a decent living by working premium hours only when they want to; (2) even those who do work regularly can achieve maximum earnings and work hours by a willingness to work additional hours to earn premium pay; (3) a certain amount of skill at working certain cargoes or performing certain tasks is subjectively taken into account by superintendents when hiring foremen and their gangs; (4) it is difficult to calculate the effect of the large number of casuals who drift into and out of work on the waterfront on racial distribution of work. It appears to the Court that NOSA and its member companies are willing and actively working at complying with Title VII, as indicated by the terms of the Settlement Agreement entered into, and also that there is a trend in job improvement of blacks in the longshore industry. At this point, we can find no broad pattern or practice of racial discrimination. *See Bailey v. Ryan Stevedoring Co., Inc.* 528 F.2d 551 (5th Cir. 1976).

III. Segregated Locals

In spite of all that we have just said, the Court does not intend to give the impression that there is no more room for improvement of the black longshoreman's position in the Port or to minimize the effect of this suit or its importance. If nothing else, as we have previously indicated, it may well have been responsible for a change in the allocation of grain work and the elimination of the 50-50 practice previously in practice. More importantly, it has brought to issue the question of whether two separate unions, one predominately for black longshoremen and one for white longshoremen, should exist in the Port of New Orleans. Section 703 (c)(2) of the 1964 Civil Rights Act states: "It shall be an unlawful employment practice for a labor organiza-

tion . . .to limit, segregate, or classify its membership or applicants for membership . . .in any way which would deprive or tend to deprive any individual of employment opportunities . . .because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e—2(c)(2).

Locals 1418 and 1419 are jointly certified by the National Labor Relations Board as the collective bargaining representatives of longshoremen on the New Orleans waterfront. They represent two locals with identical jurisdiction which appear to have no other purpose for existence than the segregation of the black and white races. The segregated locals are chartered by defendant I.L.A. Locals 1802 and 1683 also are jointly certified by the National Labor Relations Board as the collective bargaining representative of sack-sewers, sweepers, waterboys and coopers on the New Orleans waterfront. Here, too, there are two locals with the same jurisdiction, once again the only difference being that the locals are segregated on the basis of race. These two locals are also chartered by defendant I.L.A. As pointed out by the plaintiffs, the International Longshoremen's Association is the only major union in the United States that has not voluntarily undertaken to disestablish racially segregated unions within its jurisdiction. The relevant cases where this condition has been remedied by the courts are *United States v. International Longshoremen's Association,* 460 F.2d 497 (4th Cir. 1972), the Port of Baltimore; *EEOC v. International Longshoremen's Association,* 511 F.2d 273 (5th Cir. 1975), the Port of Texas; *Bailey v. Ryan Stevedoring Co., supra,* the Port of Baton Rouge.

In the face of strong oppositin from both locals to merger and also to this Court's finding that plaintiffs have not proved present discrimination, we are now faced with the problem of deciding at this stage of the proceedings whether Locals 1418 and 1419 should be required to merge and whether locals 1802 and 1683 should also be required to merge. The Court is of the opinion that it should so require the merger, either

because these racially segregated unions are in violation of 42 U.S.C. § 2000e—2(c)(2) in that they "tend" to deprive individuals of employment opportunities or because segregated locals are a *per se* violation of the Act under the language quoted above. Even though the grain clause has been deleted from the current Deep Sea Agreement, we think that it is just one of several examples presented by this case as to how the existence of two segregated unions can tend to deprive individuals of work because of the tendency of this situation to fragmentize the industry on the waterfront. As long as to the two separate unions exist in each case, another situation can arise where it is felt desirable to "keep things even," half for one union and half for the other. Even the 75%—25% ratio which appears to have emerged has the effect of dividing work according to race because the unions are segregated. When two unions share work there is ordinarily no problem. However, when the unions are substantially segregated, *any* allocation of work between them necessarily involves a division of work according to race—because race forms the basis for membership in the union. The division of the LASH work is yet another example of how these two unions are a ready-made division for splitting work, even though the division is not done on a per-employee basis and, therefore, not necessarily equitable as far as the individual workers are concerned. A third situation exists. The Deep Sea Agreement establishes three management-labor committees to administer the contract. Under its Article XIV, dealing with "Working Regulations," it establishes a Methods Committee which has the authority to approve changes in the working procedures on the waterfront as established by the contract. Article XVII, which prohibits strikes and mandates arbitration of disputes, establishes a permanent Disputes Committee which constitutes the second step of the procedure for the resolution of all disputes involving the interpretation or application of the Agreement. Article XXIII establishes a management-labor committee to

police abuses of the Guaranteed Annual Income Plan. By the terms of this contract, each of these committees is made up of four members, two from the Association and *one* from each local. Here is yet another example where each union is treated as being equal. Defendants argue that none of the committees have either met or taken any action which could have had any effect on either union. We find this immaterial, as we do the fact that the grain clause has been deleted and that mid-Gulf no longer enforces the requested LASH/vessel work quota. In the *Bailey* case, the court pointed out, *supra* at 556, that the hiring of longshoremen of the segregated locals on the basis of a 50%—50% rule was a practice which had "discriminatory potential." Even though the district court had found that for the last nine years the membership of the two locals had been quite comparable, *Bailey v. Ryan Stevedoring Co.*, 7 EPD ¶ 9424 at p. 7869 (M.D.La. 1974), the Fifth Circuit found that the 50%—50% hiring practice represented a threat of employment discrimination that violated 42 U.S.C. § 2000e—2(c)(2). We think that our situation is analogous to the *Bailey* case since the tendency exists for discrimination in both cases based on past situations, even though under the present situation in both cases no real harm is presently experienced.

However, there is one difference between the present case and *Bailey*. In *Bailey*, the Fifth Circuit Court of Appeals found that the 50%—50% division was a practice which was discriminatory. There is no practice still in effect which has been demonstrated to this Court to be discriminatory at this time. However, even if we are incorrect in concluding that some former discriminatory practices, involving the division of work between the unions which were in effect until recently, still have the tendency to create a potential for discrimination, then we find that maintenance of Locals 1418 and 1419 and maintenance of Locals 1802 and 1683 are *per se* violations of Title VII.

Before going into the question of the uncertainty of the law in the Fifth Circuit, we note that two other

circuits have held that segregated locals are *per se* unlawful. See, *United States v. International Longshoremen's Association, supra; Evans v. Sheraton Park Hotel,* 164 U.S.App.D.C. 86, 503 F.2d 177 (1974). There is no such direct holding from the Fifth Circuit, although there is no contrary holding. In *United States v. Jacksonville Terminal Company, supra,* the court, after determining that plaintiffs had proven that the defendants had committed specific acts and practices of racial discrimination in employment since the July 2, 1965, effective date of the Civil Rights Act, turned its attention to the fact that two segregated locals existed as separate entities with respect to Terminal work. The court concluded that, in view of the racial discrimination which had been proved in light of the total employment picture, "[t]he record clearly discloses that the existence of 'separate but equal' locals has had, and may continue to have post-Act deleterious effects on blacks." Consequently, the court found a direct violation of 42 U.S.C. § 2000e—2(c). Subsequent to the *Jacksonville Terminal* case, the Fifth Circuit again faced the question of the legality of maintaining segregated black and white unions. *EEOC V. International Long. Ass'n,* 511 F.2d 273 (5th cir. 1975). In this case, the main holding appears to be that since it was shown that the segregated locals had had actual discriminatory effect on employment opportunities, merger of them was mandatory. (451 F.2d at 457.) although one of the judges of the three-judge court, Judge Goldberg, attempted to find a *per se* violation, Judges Thornberry and Godbold did not feel the need to and in their concurring opinion stated at P. 280: "If a case ever comes to us with a finding by the district court that no actual employment discrimination arose from segregated locals, we may then properly consider the necessity for a rule of *per se* illegality." It is this language which gives us pause and brings us into a consideration of the issue of *per se* illegality. We view our case as one where employment discrimination arose once and could, in the future, arise from segre-

gated locals but it has not been demonstrated that it presently exists. After the *International Longshoremen's Association* case, the Fifth Circuit decided *Local* No. 293, *etc. v. Local* No. 293—A, 526 F.2d 316, 317 (5th Cir. 1976). The plaintiffs in this case alleged that the defendant local had discriminated against them on the grounds of race, for which relief was sought, and, in addition to this, plaintiffs raised the issue of the merger of segregated unions. The district court, without an evidentiary hearing and on the sole basis of the record, ordered merger of the two unions, reserving ruling on the damage claim until after a trial on the merits. The case was appealed to the Fifth Circuit on the issue of whether Title VII was applicable to the defendant local. The Fifth Circuit reversed on the basis that the district court was in error in denying the motion of defendant to dismiss for lack of jurisdiction. After this conclusion, the court in *Local 293 v. Local 293—A, supra* at 319, stated as dictum in a footnote that although the district court found no actual discriminatory effect on employment opportunity, "[s]hould jurisdiction subsequently be found . . .the plaintiffs must demonstrate such discriminatory effects." Although this language is stated to refer to the fact that the court pretermitted a decision on the validity of the lower court's grant of partial summary judgment on this issue of segregated unions, we are not convinced that the footnote statement resolves the issue at hand. In the later case of *Bailey v. Ryan Stevedoring Co., Inc., supra,* as noted by plaintiffs, the Court of Appeals cited the *Local 293* decision, but stated, as previously referred to, that the *per se* issue had not been decided by the court yet. Furthermore, following the three-judge court decision in *Bailey,* a poll of the entire court was taken on the ILA's petition for rehearing *en banc.* This petition was denied, *Bailey v. Ryan Stevedoring Company, Inc.,* 533 F.2d 976 (5th Cir. 1976), by a vote of 13 to 1. Judge Clark, as the lone dissenter, argued that, in light of the district court's uncontradicted finding that there had been no discriminatory effects, the panel's

reliance on "future contingencies" was wrong. He "[construed] the panel opinion to override the vital associational rights involved in the case *on the basis of legal deductions* that are contrary to the facts and to valid prior precedent in this circuit." (Emphasis added.) *Supra* at 976. We agree with plaintiffs that it appears that Judge Clark, himself, concluded that the panel's reliance on "future contingencies" amounted to a rule of *per se* illegality.

Judge Clark also stated in the panel consideration of *Bailey, supra* at 977, that the appellate court had mandated the district judge "to grant Bailey's motion to force the merger of two independent union locals who do not want to merge." The two locals in our case also do not want to merge. Nor did the locals wish to merge in *United States v. Jacksonville Terminal Company, supra,* or in *EEOC v. International Long. Ass'n, supra.* In the opinion of the lower court in the latter case, *United States v. International Longshoremen's Ass'n,* 334 F.Supp. 976, 978 (S.D.Tex.1971), the district court pointed out that black union officials urged the court not to order merger, insisting that "...the negroes, by having their own unions and their own union officials, have been able to better themselves by being able to hold high positions in their locals, and have been recognized in the community as a separate, powerful voice for the Negro communities, and has attained for them and the Negro people of the Community, a standing which they could not have otherwise attained." The Defendant Local 1419 argues, along the same lines in the instant case, that it is larger, wealthier and better manned than Local 1418, better services its members' needs than Local 1418, provides substantial benefits which the latter does not and cannot provide and is free from substantial debt, unlike 1418. In the words of Local 1419's attorneys:

> Over the years, Local 1419 has regarded itself, and has been regarded by others, as a special spokesman and leader of the black community both on the waterfront and in economic, social and political

> affairs generally. It has used its resources and the energies of its officers and members to promote a wide variety of black educational, social and political programs in an effort to improve the lot of the black community. Local 1419 is a potent force on behalf of blacks in New Orleans and Louisiana.

By our decision, we do not mean to imply that the foregoing attitude is not a noble endeavor, but we doubt that it is one which ought to be pursued under the direct auspices of a labor union. Other courts have recognized the validity of the anti-merger position but have rejected this argument against merger. In *United States v. International Longshoremen's Ass'n, supra* at 978, the district court countered that " . . .the ultimate issue before the Court is whether this pattern or practice of having segregated locals is keeping longshoremen, be they Black or White, from equal working opportunities on account of a longshoremen's race or national origin." And the Fifth Circuit countered in the *Jacksonville Terminal case, supra* at 457 that:

> Contrary to the allegations made by the Unions, we find that their locals are not mere "social clubs," having no influence in national union policy or practice. We conclude that the District Court erred in refusing to hold that the failure to consolidate the locals violates section 703(c) of the Act, 42 U.S.C.A. § 2000e—2(c).

The effect of dual unions is described by both Judge Goldberg, in *Bailey,* 451 f.2d at 457, and by the Fourth Circuit in *United States v. International Longshoremen's Association, supra* at 500, to the effect that representatives of separate unions charged with only serving that union cannot be realistically expected to act strongly on behalf of the other union and, consequently, both conclude that agreements between labor and management emerging from bargaining by one union on behalf of all longshoremen rather than one charged with serving white employees and the other with serving black employees will better the employment status of all employees. For this reason, this

Court concludes that each of the two locals should be merged.

The foregoing represents this Court's findings of fact and conclusions of law in this case. Let judgment be entered accordingly.

APPENDIX B

United States District Court
Eastern District of Louisiana

WILLIAMS, ET AL

VERSUS

NEW ORLEANS
STEAMSHIP ASSOCIATION, ET AL

CIVIL ACTION
NO. 71-873
SECTION "B"

MINUTE ENTRY ON MOTION
FOR RECONSIDERATION

June 30, 1980

Subsequent to the Court's decision in this case, reported as *Williams v. new Orleans Steamship Association*, 466 F.Supp. 662 (E.D.La.1979), plaintiffs filed a motion for reconsideration of the grain cargo issue. Plaintiffs seek two things: (1) to have the Court certify a class, pursuant to Rule 23(b)(2), F.R.Civ.P., composed of members of ILA Local 1419 who, subsequent to May 29, 1967, worked or sought work on the New Orleans waterfront and who were not regulars in grain cargo gangs; (2) to find liability on the part of the defendants to the class with respect to the allocation of grain cargo work. Plaintiffs, in their supporting memorandum, state that they have limited the motion under submission to the grain cargo issue because in this "one instance the Court appears to have accepted plaintiffs' contention that the challenged practice was racially discriminatory." It is their position that the allocation of work under the terms of the grain clause was racially discriminatory and that, under the authorities, it is clear that defendants are liable for back pay for the earnings lost as a result of this violation.

The question of the racially discriminatory effect of the grain cargo clause raises two issues. The first has to do with the existence of two racially segregated unions. In our previous decision, we made a clear finding that the grain clause was inserted in the Deep Sea Agreement between the unions and NOSA at the insistence of the officers of the black union in order to protect the members of that union. Although we noted, at p. 673, that the division of grain work on a 50-50 basis was discriminatory under the circumstances, we noted that the evil in the situation was that it was accomplished through a segregated union system.[1]

[1]We stated, at p. 673, that the division of grain cargo work under the grain clause was discriminatory. In the context of our opinion this obviously referred to discriminatory potential. On the record of this case this Court could not have found that the individual plaintiffs had carried their burden of proving either their individual claims or class claims. In fact, at p. 672, we found that "plaintiffs have not proved employment discrimination in the specific areas they have delineated which is applicable to a specific group of employees similarly situated and generally acted upon by the defendants with respect to an applicable class." And, at p. 667, we specifically designated as a specific area "racial discrimination in preferred work assignments, i.e., longshoremen assigned to grain crews. . . ."

The Court never found that the existence of the clause was a violation of Title VII. We condemned the clause, at p. 678, as establishing "a practice which had 'discriminatory potential.' " At this point, we were specifically concerned with the maintenance of segregated local unions. Our specific holding was that the existence of segregated unions, because they constituted a built-in *threat* for employment discrimination, was in violation of Title VII, 42 U.S.C. § 2000e-2(c)(2). It was for this reason that we enjoined the practice of maintaining separate segregated locals and ordered that they be merged.

In our decision, we cited and heavily relied on the case of *Bailey v. Ryan Stevedoring Co., Inc.*, 528 F.2d 551 (5th Cir. 1976), in which the Fifth Circuit held that defendant's practice of dividing longshore work on a 50-50 basis between the two segregated local longshore unions represented "a possible future threat of discrimination." However, the Fifth Circuit upheld the trial judge in denying relief on the individual or class action claims. On appeal from the district court's disposition on remand, the Fifth Circuit again reconsidered the merger issue in *Bailey*. It held that the failure of plaintiffs to prove their individual claims did not deny them standing to challenge the segregated union system on the basis of the "threat of employment discrimination." *Bailey v. Ryan Stevedoring Co., Inc.*, 613 F.2d 588, 590 (5th Cir. 1980). It was in this manner that we, also, treated the segregated local unions, using the grain clause as evidence of the threat of discriminatory treatment.

The second issue is the impact of the grain cargo clause on black longshoremen. We believe that our decision adequately discussed the issue of class certification with respect to grain cargo work and subsequent liability for the alleged discriminatory allocation of it. (The issue was raised at p. 667 and decided by the Court in its decision at pp. 676-677.) However, on reexamination of the issue we reach the same result.

As proof of the asserted discriminatory effect

caused by the 50-50 allocation of grain work, plaintiffs point out that in the contract years of 1970-71, 1971-72 and 1972-73, there was almost $8 million worth of grain cargo work performed on the New Orleans waterfront and that black longshoremen received only 49.9% of it. They, therefore, conclude that because premiums of up to 40 cents an hour are paid for grain cargo work [In our decision, see p. 673, we found a 20 cent per hour premium for such work.], this clearly establishes economic loss to blacks as a result of the allocation on racial lines, regardless of the availability of longshore work at *regular rates*. However, this ignores the fact that there are premium rates for other types of work besides that for grain cargo. This includes special kinds of work, such as, meal time, night work, weekends, damaged cargo, explosives, etc. And, as pointed out by the defendants, by not including them in the statistical picture, the possiblility of an inaccurate distortion exists. We agree with defendants that plaintiffs were unable to show that the overall work allocation in the longshore industry was disproportionate or inequitable and we think that such a showing is crucial to prove racial discrimination. No longshoremen works exclusively at one type of work. Since he may work various types of cargo at different hours in any given week, the important thing is how he fares overall. We demonstrated this in our decision, at p. 667, with the reproduction of the chart comparing earnings for black and white longshoremen for the contract year 1972-73. This chart showed blacks holding their own. There is no indication that the grain clause and the 20 cent differential created an overall discriminatory effect on the amount of money earned by black longshoremen. We think that the evidence as a whole established that blacks in the longshore industry receive their proportionate share of work and pay according to their numbers.

Accordingly,

IT IS THE ORDER OF THE COURT that the motion of plaintiffs to have the Court certify a class

composed of members of ILA Local 1419 who, subsequent to May 29, 1967, worked or sought work on the New Orleans waterfront and who were not regulars in grain cargo gangs, and to find liability on the part of the defendants to such a class with respect to the allocation of grain cargo work is hereby DENIED.

Frederick J.R. Heebe
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States District Court
Eastern District of Louisiana

WILLIAMS, ET AL

VERSUS

NEW ORLEANS STEAMSHIP ASSOCIATION, ET AL

CIVIL ACTION
NO. 71-873
SECTION "B"

September 5, 1979

JUDGMENT

On the basis of this Court's Findings of Fact and Conclusions of Law, entered February 14, 1979, and on the basis of this Court's Minute Entry and Order, entered August 23, 1979, Judgment is hereby entered, as follows:

IT IS ORDERED THAT defendant ILA General Longshore Locals 1418 and 1419 and defendant ILA Sacksewers, Sweepers, Waterboys and Coopers Locals 1802 and 1683 be merged, each pair, into one integrated local by October 31, 1979.

IT IS FURTHER ORDERED THAT on or before November 30, 1979, counsel for the defendant local unions shall file with the court, and serve on opposing counsel, a statement describing the implementation of this Judgment.

This Judgment applies only to the issue of the merger of local unions raised in this action. Issues as to the entitlement of plaintiffs to attorneys' fees and costs, pursuant to 42 U.S.C. § 2000e—5(k), as to this issue are deferred until after entry of judgment on the remaining issues in this case.

Done this 4th day of September, 1979, in New Orleans, Louisiana.

Frederick J.R. Heebe
UNITED STATES DISTRICT JUDGE

APPENDIX D

United States District Court
Eastern District of Louisiana

WILLIAMS, ET AL

VERSUS

NEW ORLEANS STEAMSHIP ASSOCIATION, ET AL

CIVIL ACTION
NO. 71-873
SECTION "B"

October 1, 1980

JUDGMENT

This action came on for trial before the Court, and the issues having been duly tried, a decision having been duly rendered, and plaintiffs' motion for reconsideration having been denied.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, except as stated herein and except as stated in this Court's Judgment in this action entered September 5, 1979, the plaintiffs take nothing from the New Orleans Steamship Association and/or its member companies and the action be dismissed on the merits as to these defendants. Defendant New Orleans Steamship Association and its member defendants shall bear their own costs. The Court will entertain an application by plaintiff, filed on or before October 31, 1980, for an award of costs, including attorneys' fees, against the union defendants, pursuant to 42 U.S.C. § 2000e—5(k), reserving to the union defendants any and all defenses they may have to the request by plaintiffs for attorneys' fees.

Dated: October 1, 1980

Frederick J.R. Heebe
UNITED STATES DISTRICT JUDGE

APPENDIX E

George James WILLIAMS, et al
Plaintiffs-Appellants

v.

NEW ORLEANS STEAMSHIP ASSOCIATION, et al., Defendants-Appellees

No. 80-3886

United States Court of Appeals
Fifth Circuit

April 9, 1982

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Plaintiffs George Williams, Duralph Hayes, and Ernest Turner, Jr. and intervenors Matthew Richard and John Aaron sued New Orleans Steamship Association (NOSA), sixteen[1] of its member stevedoring companies, Locals 1418 and 1419 General Longshore Workers, International Longshoremen Association (ILA), and Locals 1802 and 1863 Sacksewers, Sweepers, Waterboys, and Coopers, ILA, alleging individual and class-wide employment discrimination in the Port of New Orleans in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981.[2] After an eighteen day trial, the court ordered the merger of the previously segregated Locals 1418 and 1419 and Locals 1802 and 1863 but dismissed the remainder of plaintiffs' claims and refused to certify a class pursuant to Fed.R.Civ.P. 23. In this appeal, plaintiffs contest the court's dismissal of their claims of discrimination in the allocation of grain work and in the assignment of preferred positions in general cargo gangs as well as the court's refusal to certify a plaintiff class. We hold that the court erred in denying plaintiffs' claim concerning the allocation of grain work and in refusing to certify a class with respect to that claim. We affirm the dismissal of the discriminatory assignment claim and the court's refusal to certify a class in that instance.

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1. NOSA is composed of 62 stevedoring and shipping companies. Originally, thirty-two companies were named as defendants, but plaintiffs voluntarily dismissed charges against sixteen companies prior to trial.

2. Although there are differences between Title VII and § 1981 actions, *i.e.* statute of limitations and remedies available, those differences are not present in the issues considered in this appeal. Therefore, when we refer to either statute, our reasoning encompasses the other as well, unless we specify otherwise.

I. FACTS

The district court's opinion amply describes the factual background of this eleven year old case. See *Williams v. New Orleans Steamship Association*, 466 F.Supp. 662 (E.D.La.1979). Because this appeal concerns the employment practices in particular areas of the stevedoring industry, it is necessary to describe briefly the operations of the industry in the Port of New Orleans.

Originally, employment on the waterfront was casual and unsystematic. After a 1974 Department of Labor study, a registration system was instituted. Today, waterfront workers are categorized by craft and registered accordingly. Each craft is under the jurisdiction of a different ILA local.

This appeal involves alleged discrimination against Craft 1 workers. Craft I is comprised of general longshoremen previously under the jurisdiction of Locals 1418 (white) and 1419 (black),[3] now under the jurisdiction of the merged Local 3000. Within each craft, workers are classified according to their priority for employment opportunities based upon their length of service with a particular company. The highest ranking categories are considered "registered" (as opposed to "casual") and comprise the majority of longshoremen. Throughout the relevant time period,[4] approximately 75% of all registered longshoremen were black. Thus membership in Local 1419 was three times

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3. At the time of trial, Local 1418 was more than 99% white and Local 1419 was all black. The district court found the maintenance of segregated locals violated Title VII because of the potential for discrimination created by dual unions. The court ordered their merger. 466 F.Supp. 662, 680 (E.D.La.1979). Merger was accomplished in 1980.

4. The relevant time period for the Title VII claim began in September, 1967, 180 days before the first charge was filed by plaintiffs with the E.E.O.C. *See McWilliams v. Escambia County School Board*, 658 F.2d 326 (5th Cir. 1981). It began on March 30, 1970 for the § 1981 claim. *Pegues v. Morehouse Parish School Board*, 632 F.2d 1279, 1281 (5th Cir. 1980), *cert. denied*, 451 U.S. 987, 101 S.Ct. 2322, 68 L.Ed.2d 844 (1981) (§ 1981 claim of employment discrimination is subject to Louisiana's one year statute of limitations. La.Civ. Code Art. 3653).

as great as that of Local 1418.[5]

Longshoremen load and unload ships. The work is performed on a day-to-day basis, seven days a week. Stevedoring companies hire longshoremen daily through the Waterfront Employment Center owned and operated by NOSA. The workers are organized into "gangs" of varying size, depending on the type of cargo to be loaded or unloaded. Typically, grain gangs employ eight men and general cargo gangs sixteen. Pay rates for the various jobs are set out in the Deep Sea Agreement negotiated between NOSA and the Locals.

Hiring is done twice daily at "shape-ups." Each stevedore chooses a foreman for each gang needed that day and the foreman then hires the necessary gang members. Many companies have "regular" gangs comprised of registered longshoremen who frequently work for that company and are given preference on available work. If a company has more work than can be handled by its regular gangs, it employs "non-regulars" who are either regulars with other companies or "casuals" not associated with any particular company. This results in all longshoremen working for virtually all the stevedores at one time or another. Although many workers become associated with a particular company from time to time, none works exclusively for one company.

Despite the registration system, employment is still largely casual. The work performed by a longshoreman varies from day to day depending on a variety of factors including the work available as well as personal choice. Longshoremen are not required to work any particular days or hours. If they want to work, they simply come to a shape-up. The rates of pay vary for different jobs and different shifts. For example, in 1973, grain work paid a 20¢ per hour premium. Work performed during mealtimes, weekends, and holidays also pays a premium. A longshoreman may choose to shape-up only when there is a certain

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5. At the time of trial, Local 1418 had 750 members, 744 of whom were white. local 1419 had 3608 members all of whom were black.

type of work available or only during certain hours. Thus the longshoreman's job and wages are determined in part by personal factors.

The employment relationship ultimately is controlled by the Deep Sea Agreement which specifies the terms and conditions of employment and the varying wages for each job. In this appeal, plaintiffs contest the employment practices concerning the allocation of grain work and the job assignments in general cargo gangs. Before 1974, the Agreement required that so far as practicable, grain work should be divided evenly between Locals 1418 and 1419, notwithstanding their disproportionate memberships.[6] There was no corresponding provision respecting assignments in general cargo gangs; plaintiffs contest an alleged practice by white foremen of assigning white longshoremen to the more preferable jobs.

II. ALLOCATION OF GRAIN WORK

A. Separate Claim of Racial Discrimination in Grain Work.

Grain work comprises approximately 8% of all longshore work and involves the loading and unloading of ships carrying grain. It is physically less demanding than other types of work because the cargo is pumped rather than carried onto and off of vessels. Grain workers often become covered from head to toe in grain and inhale particles, however, and because of this unpleasantness, a premium is paid for grain work.

Pursuant to the Deep Sea Agreement, grain work was allocated equally between the members of the black and white locals. Plaintiffs contend that this practice violated Title VII and § 1981.

The district court's original order in this case, dated February 14, 1979, 466 F.Supp. 662, was five years after the trial. In that order, the court found that the 50-50 allocation of grain work was discriminatory,

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6. This clause was eliminated by agreement of NOSA and the Locals in 1974.

yet it did not find a violation of Title VII. Upon plaintiffs' motion for reconsideration of the issue, the court clarified by saying its earlier holding meant that the contract clause requiring 50-50 allocation was not discriminatory but that it was evidence of the discriminatory potential inherent in a system that maintained segregated local unions.

The court then reconsidered plaintiffs' allegation that the practice of 50-50 allocation was discriminatory in and of itself. Again, the court did not find a violation of Title VII. This time its conclusion was based upon its finding that, because longshoremen perform more than one type of work, evidence focusing on only one of these jobs, *i.e.*, grain work, would distort the analysis. "The important thing is how [the black longshoremen] fares overall." The court then considered the overall welfare of black longshoremen and concluded that in the Port of New Orleans, they received their proportionate share of work and pay. Thus the court found no discrimination.

[1, 2] An appellate court must accept a trial court's findings of subsidiary facts unless clearly erroneous; however, the court's ultimate finding on the issue of discrimination is subject to review free of the clearly erroneous standard. *Wright v. Western Electric Co.*, 664 F.2d 959, 963 (5th cir. 1981). Furthermore, this Court is not bound to any degree by the district court's conclusions as to the law, *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1382 (5th cir. 1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979), nor are we bound by findings of fact based upon erroneous applications of law, *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 422 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981). We find that the district court's opinion was based upon an erroneous legal conclusion as to the viability of plaintiffs' grain claim. Thus our review of the court's findings of fact is not bound by the clearly erroneous standard of Fed.R.Civ.P. 52(a).

[3] In concluding that the plaintiffs failed to prove discrimination, the district court misconstrued plain-

tiffs' allegation. By comparing the overall economic picture of blacks and whites, the court transformed plaintiffs' claim of discrimination in the allocation of grain work into a claim of discrimination in the entire industry.[7] The court erroneously concluded that plaintiffs' segmented claim was not cognizable under Title VII and § 1981.

[4] Claims alleging discrimination in only one segment of an employer's workforce are cognizable under Title VII and § 1981. The Supreme Court recognized this principle in one of the landmark Title VII cases, *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). There, the United States brought suit on behalf of blacks and Spanish-surnamed persons against a large trucking company and the union which represented its employees claiming that the company engaged in a pattern or practice of discrimination in the hiring of line drivers. Minorities who were hired allegedly were relegated to the lower paying, less desirable positions and met with insurmountable difficulties in trying to gain promotions and transfers.

The government's case consisted of powerful statistical evidence showing a gross disparity between the percentage of minorities in the company's workforce as a whole and those in line driver positions. Those statistics, coupled with the testimony of individuals who recounted over forty specific instances of discrimination, established the government's prima facie case. The company was unable to rebut this evidence, and

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7. We also note that the district court's statistical analysis concluding that black overall fared as well as whites is flawed. The chart showing these figures is derived from defendant NOSA's exhibits and contains a comparison between earnings of the 702 highest paid blacks and whites which reveals higher earnings for blacks. See 466 F.Supp. at 667. Actually, the court states that the comparison is based upon the 600, rather than 702, highest earners of each race. As both parties point out, the data in fact encompasses the 702 top earners of each race. During the period reflected in the chart, there were 702 white and over 2100 black longshoremen. Thus, this chart ignores the earnings of approximately 1500 blacks. All the chart shows is that man for man from the top down, 702 of 2100 blacks fared at least as well as all whites. A better comparison would have been between the average earnings of *all* black and *all* white longshoremen.

the government prevailed on the issue.

Line drivers only comprised approximately one-fourth of the truck driver positions, yet the Court recognized the validity of the departmentalized claim. The Court did not look to the overall picture of minorities within the company's employ to determine the validity of the claim. Minorities may have fared overall as well as their white counterparts, yet the Court did not consider this factor in evaluating the evidence. The government was permitted to charge discrimination in one job classification only and to prove its case by offering statistical evidence relevant only to that job.

In determining whether a particular claim of discrimination in only a segment of an employer's work force is cognizable the operative factor must be the distinctiveness of the segment. In *Teamsters, supra,* the duties and compensation of line drivers differed from those of other driver positions and thus line drivers constituted a distinct job classification.

A similar distinction exists between grain work and other types of longshoring jobs in New Orleans. The tasks performed by grain workers differ from those performed by other longshoremen because of the nature of the cargo involved. Furthermore, the Locals and NOSA traditionally have treated grain work separately from other types of longshore work, as evidenced by the Deep Sea Agreement. The hourly wage paid for grain work is negotiated separately from other types of work.[8] The mode of allocating jobs evenly between the black and white Locals was also unique to grain work. Thus, while longshoremen can and do perform a variety of jobs, the distinctiveness of grain work makes plaintiffs' claim of discrimination in this one area of employment viable under Title VII and § 1981.

In fact, the court below recognized the validity of segmented claims within the industry in New Orleans.

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8. The fact that the wage is the same as that paid for some other job situations does not change our conclusion that the grain wage is a separately bargained-for part of the Agreement. Grain work has traditionally carried a premium of at least 20¢ per hour over the basic longshoring rate.

Although it refused to consider plaintiffs' claims of discrimination in the allocation of grain work, it permitted similar segmented claims with respect to other sectors of the industry. A clear example is the court's consideration of plaintiffs' allegation of discrimination in job assignments in general cargo gangs. Although the court ultimately rejected plaintiffs' claim on the merits, it recognized the segmented claim and considered statistics relevant only to general cargo gangs, not the entire industry.

Furthermore, both logic and the policies underlying Title VII dictate the conclusion that a segmented claim is cognizable. Title VII proscribes racial discrimination of any kind in virtually all aspects of employment. There is nothing in the Act to indicate that a claim for discrimination in one distinct category of employment within a plant, industry or office, or even in one job, is not cognizable.

Were we to accept defendants' contentions, we would be ruling in effect that an employer may discriminate with impunity as long as it confines such action to some units or departments within the workforce while maintaining an overall facade of equality. An employer guilty of plant or industry-wide discrimination may be a worse offender of Title VII than one who discriminates in only a single department. The remedies awarded to the former's employees as well as the penalties assessed against it may be greater than those imposed upon the latter. As to liability, however, both are equally subject to the prohibitions of Title VII.

The cases relied upon by defendants in support of the judgment below are unpersuasive. None of these cases involved the question of whether a segmented claim may be brought against an employer. In *Swint v. Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976), *cert. granted* (after an earlier remand), 451 U.S. 906, 101 S.Ct. 1972, 68 L.Ed.2d 293 (1981), plaintiffs alleged that the defendant engaged in a pattern or practice of racial discrimination in departmental assignments within its production plant. To prove their claim,

plaintiffs offered statistical evidence of racial disparity in nine of the twenty-eight departments. We discarded the proffered analysis because it focused on only nine of twenty-eight departments. 539 F.2d at 94-95. Instead, we held the proper statistical focus should have encompassed the entire plant and thus plaintiffs' evidence of racial imbalances in a *segment* of the plant was insufficient to establish a prima facie case of *plant-wide* discrimination.

In *E.E.O.C. v. Datapoint Corp.*, 570 F.2d 1264 (5th Cir. 1978), plaintiffs raised a claim of racial discrimination in hiring and job assignments. They introduced statistical evidence showing gross imbalances in some job categories, but no evidence as to the employer's workforce as a whole. The district court rejected this as proof of a prima facie case. We upheld its decision stating that while "plaintiffs' statistical evidence alone might be sufficient to infer discrimination in these job categories . . .[to prove] a *prima facie* case of racial discrimination, such statistics must be relevant, material and meaningful . . ." 570 F.2d at 1269. Because plaintiffs' claim was one of employer-wide discrimination, the segmented, isolated statistics offered were misleading and therefore meaningless.

Contrary to defendants' contention, these two cases do not stand for the proposition that plaintiffs' claim of discrimination in grain work is not cognizable. In both cases, plaintiffs charged the employer with plant-wide discrimination but offered statistical evidence which was limited to small segments of the plant. In denying plaintiffs' claims, we held that the proffered limited statistics were insufficient to prove the broad claims asserted.

Here, plaintiffs alleged discrimination in one separate job category within the industry. Naturally, then, their statistics focused on the subject area. Unlike the *Swint* and *Datapoint* plaintiffs, they did not offer a segmented statistical analysis as a means of trying to prove industry-wide discrimination. Indeed, that was not their claim. The district court, neverthe-

less, treated their offer of proof as one for industry-wide discrimination. As such, plaintiffs' statistics certainly would not prove a prima facie case, for the reasons cited in *Swint* and *Datapoint*. The court refused to consider plaintiffs' proof in the context in which it was offered, and we find this to be reversible error.

Lee v. City of Richmond, 456 F.Supp. 756 (E.D. Va.1978) and *Croker v. Boeing Co.*, 437 F.Supp. 1138 (E.D.Pa.1977), *aff'd*, 662 F.2d 975 (3d Cir. 1981), also relied upon by defendants, are equally unsupportive. Both cases, as do our decisions set out above, stand only for the proposition that segmented statistical evidence of racial imbalances within a few departments cannot prove a prima facie case of employer-wide discrimination. Neither of these cases addresses the validity of a claim of segmented, departmentalized discrimination such as the one posed by plaintiffs herein. Therefore, they do not support defendants' position in this appeal.

We hold that the district court erred in refusing to recognize plaintiffs' claim and in transforming it into one of industy-wide discrimination.[9] Plaintiffs presented a cognizable claim under Title VII and § 1981. We now turn to the merits of that claim.

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9. The district court's opinion could be interpreted as recognizing plaintiffs' depatmentalized claim but rejecting the proffered statistics as non-probative because of the statistical "population" chosen by plaintiffs. We reject such an interpretation, however. Statistical analyses are easily manipulated by choosing as a comparative population a pre-selected group which will reflect the desired outcome. Therefore, a fundamental principal in the use of statistics in Title VII cases is that the population chosen for comparison be meaningful, relevant, and probative to the claims asserted. A population appropriate in one case might be inappropriate in another. In *Teamsters, supra*, plaintiffs compared the percentage of black line drivers to the percentage of blacks in the general population of various cities. 431 U.S. at 337 n.17, 97 S.Ct. at 1855 n.17. The same population was rejected by the Court in *Hazelwood School District v. United States*, 433 U.S. 299, 308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977). There, plaintiffs alleged racial discrimination in teacher hiring in a public school district. Their statistical evidence included a comparison of the percentage of black teachers hired by the district with the percentage of blacks in the geographical area. The Court held that the proper population encompassed only those blacks qualified as teachers and that plaintiffs' suggested population had little probative value in the context of the claim asserted.

The court below did not reject plaintiffs' selection of the meaningful population; rather, it rejected the sample. Both the parties and the district court agreed that the relevant population was the registered longshore workforce in

B. The Prima Facie Case

Having found plaintiffs' claim for discrimination in the allocation of grain work to be cognizable under Title VII and § 1981, we turn now to plaintiffs' evidence to determine whether a prima facie case was made. We note at the outset that the contract clause requiring the 50-50 allocation of grain work was eliminated in 1974. Because the clause formed a significant part of plaintiffs' evidence, our discussion in this section pertains only to the time period in which the objectionable clause was in effect.

Plaintiffs' claim is one of class-wide disparate treatment. Thus, the inquiry must be whether defendant treated members of the plaintiff class differently from their white counterparts, and if so, whether that difference was the result of discriminatory intent. In some cases, proof of the latter can be inferred from strong statistical evidence of the former. *Teamsters,* 431 U.S. at 335 n.15, 97 S.Ct. at 1854 n.15; *Pouncy v. Prudential Insurance Company of America,* 668 F.2d 795 at 802 (5th Cir. 1982); *Wilkins v. University of Houston,* 654 F.2d 388, 395 (5th cir. 1981).[10] Plaintiffs introduced statistical evidence which they contend proved a significant disparity between blacks and whites in the allocation of grain work.

New Orleans. Neither the court nor the defendants were willing to accept plaintiffs' choice of black grain workers as the appropriate sample, however. Their designation of this sample as irrelevant is the equivalent of finding the claim uncognizable under Title VII. Plaintiffs did not allege industry-wide discrimination; therefore, an analysis showing their overall welfare was not probative. Nevertheless, the court insisted on using blacks in the whole industry as the sample, thereby ignoring plaintiffs' claim and creating one of its own. We believe this action constitutes a rejection of plaintiffs' claim, not their statistical analysis.

10. Such an inference differs from the proof required by the plaintiff in a case alleging individual discrimination. There, a plaintiff must prove (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that the position remained open and the employer continued to seek applicants. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); *Wright,* 664 F.2d at 962.

[5] Statistics have become an important and useful tool in civil rights litigation. In many cases, they are the only evidence available to plaintiffs. Pragmatically, too, statistics assist in the evaluation of employer practices because "absent explanation, it is ordinarily to be expected that nondiscriminatory . . .practices will in time result in a work force more or less representative of the racial and ethnic composition of the population . . .from which employees are hired." *Teamsters,* 431 U.S. at 339 n.20, 97 S.Ct. at 1856 n.20.[11] Thus, "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof . . ." *Hazelwood,* 433 U.S. at 307-08, 97 S.Ct. at 2741. *Wilkins,* 654 F.2d at 395.

Plaintiffs introduced statistical evidence showing the allocation of grain work in ten of the NOSA companies[12] for the years 1971-73. In 1971, there were six grain gangs composed of 31 whites and 32 blacks; in 1972, there were 19 gangs composed of 72 whites and 76 blacks; and in 1973 there were 18 gangs composed of 67 whites and 71 blacks. Thus while blacks comprised 75% of the registered workforce, they held only 51.3% of the grain positions. A calculation of the binomial distribution, *see Castaneda v. Partida,* 430 U.S 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), reveals that the actual number of black grain workers deviated from

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11. In this case, all parties agree that the appropriate population is the registered workforce in the Port of New Orleans.

12. Not all of the defendant companies use grain gangs and some do so only in certain years. Thus, from 1971-73, only ten companies used grain gangs.

the expected number by 10.24 standard deviations.[13] This is well sufficient to prove a prima facie case of discrimination. *Id.* at 496 n.17, 97 S.Ct. at 1281 n.17.

In addition to this strong statistical data, plaintiffs introduced into evidence the contract between the Craft I unions and NOSA which specifically compelled the allocation of grain work according to race. It provided that "so far as is practical, work is to be divided between members of ILA Locals 1418 and 1419 in grain trimming machine gangs, and/or hand trimming gangs." *Williams v. NOSA*, 466 F.Supp. at 673. In practice, this meant that grain gangs were half black and half white. *Id.*

The contract clause and the statistics are powerful evidence of purposeful discrimination. The statistics alone show that it is quite unlikely that random, impartial hiring practices would have produced such disparities. And, in light of the contract's compelled discrimination, any doubts as to purposefulness must be resolved in plaintiffs favor. We hold that plaintiffs established a prima facie case of purposeful discrimination in the allocation of grain work.

C. Defendants' Rebuttal

Once plaintiffs have proved a prima facie case of

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13. The calculation is as follows:

$$\text{Number of S/D} = \frac{O - NP}{\sqrt{NP(1-P)}}$$

where

S/D = Standard deviations
O = Actual number of black grain workers during 1971-73
N = Total number of grain workers during 1971-73
P = Probability of black person working in grain gang

$$\text{S/D} = \frac{179 - (349 \times .75}{\sqrt{(349 \times .75 (.25)}} = 10.24$$

The standard deviation represents the variance between the number of blacks expected to be grain workers in a random selection system and the number of blacks actually receiving grain work. A deviation greater than three times the standard deviation is prima facie proof that the selection system is not random. *Castaneda*, 430 U.S. at 496 n.17, 97 S.Ct. at 1281 n.17.

purposeful discrimination, defendants must rebut plaintiffs' case by discrediting plaintiffs' evidence or providing a "nondiscriminatory explanation for the apparently discriminatory result." *Teamsters,* 431 U.S. at 360 n.46, 97 S.Ct. at 1876 n.46. If the defendants fail to rebut the prima facie case, plaintiffs prevail on the issue.[14]

At no point in this eleven year proceeding have defendants disputed the validity of plaintiffs' statistics relating to the allocation of grain work. In fact, the statistical data was derived from the defendant companies' Answers to plaintiffs' Interrogatories. Defendants challenged the designation of black grain workers as the sample and argued that the analysis should have focused upon *all* black longshoremen. We responded to this contention in Part I, *supra* and need not reiterate our holding.

Instead, defendants offered explanations for the statistical disparity which they contend satisfied their rebuttal burden. First, they contend that because the offensive clause was included at the insistence of black Local 1419, in following its mandate they were only following the wishes of those who now claim to have been discriminated against. This appears to be factually correct; nevertheless, it does not excuse discrimination on the part of the union or the employer. "The rights assured by Title VII cannot be bargained away—either by a union, by an employer, or by both acting in concert." *United States v. St. louis—San Francisco Railway Co.,* 464 F.2d 301, 309 (8th Cir. 1972) (en banc), *cert. denied,* 409 U.S. 1116, 93 S.Ct. 913, 34 L.Ed.2d 700 (1973). We have held "[t]he fact that a contract required this limitation [of employment opportunities] is not a justification if it is discriminating." *United States v. Hayes International Corp.,* 456 F.2d 112, 117 (5th Cir. 1972). Clearly, then, neither the existence of the contract nor its origin can

14. This is more onerous than the rebuttal burden required of defendants in individual Title VII claims under *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254—256, 101 S.Ct. 1089, 1094—95, 67 L.Ed.2d 207 (1981). *Cf. Castaneda v. Pickard,* 648 F.2d 989, 994 (5th Cir. 1981).

exonerate defendants' discriminatory practices.

[8] Second, defendants claimed that because blacks in the longshore industry fared overall as well as or better than whites, any misallocation of grain work is irrelevant. As we stated above, this type of analysis transforms plaintiffs' claim into one of industry-wide discrimination. Whether blacks as a whole suffered economically has no bearing on the issue of discrimination in the allocation of grain work. *Swint,* 539 F.2d at 92. Plaintiffs readily admit that industry-wide earnings of blacks may be relevant on the issue of backpay. This evidence has no place in the liability phase, however. *Id.* Defendants also argue that grain work was no more desirable than any other type of work. Although it paid a 20¢ per hour premium, it was unpleasant. The desirability of grain work is irrelevant as well. Title VII provides for equal opportunities in *all* jobs whether better or worse than others. *Teamsters,* 431 U.S. at 338 n.18, 97 S.Ct. at 1855 n.18; *Hayes International Corp.,* 456 F.2d at 118.

Finally, defendants argued that the casual nature of the longshore industry precludes a finding of discrimination. We have already described the shape-up process and the many variables that determine a longshoreman's position and earnings. The unpredictability of available work coupled with the personal choices inherent in the system normally would complicate our inquiry. Because so many of the factors determining work patterns are not within the employer's control, and in fact are determined by the employees, it is more difficult to attribute statistical imbalances to a discriminatory motive on the part of the employers. Here, however, we need not speculate as to the reasons for the imbalance because the contract shows that such an allocation was required. Whether the casual nature of the industry could or would have produced similar disparities is irrelevant in the face of the explicit language of the Deep Sea Agreement.

We hold that defendants failed to rebut plaintiffs' prima facie case of purposeful discrimination in the

allocation of grain work during the existence and application of the 50-50 clause. The statistical data introduced by plaintiffs pertains only to the period during which the discriminatory contract was in force. Because our conclusions are based upon evidence relative to this period only, our finding of discrimination is limited accordingly. Plaintiffs contend that even after the deletion of the 50-50 clause, the practice of discriminatory allocation continued. We turn now to that claim.

D. Discrimination in the Allocation of Grain Work After the Deletion of the 50/50 Clause

Thus far we have held that there was purposeful discrimination in the allocation of grain work during the pendency of the grain clause. Plaintiffs contend that the discriminatory practice continued after the deletion of the clause and that the court below erred in refusing to consider the issue. Defendants argue that plaintiffs waived the issue of post-clause discrimination because they failed to request its consideration by the court.

It is plaintiffs' assertion that the clause was eliminated after the close of the record; defendants contend the opposite. We find plaintiffs' assertion ironic. If the clause were eliminated after trial, the record would have closed, and thus the only evidence plaintiffs could have produced would have concerned the practices existing during the application of the clause. Because a court's consideration need not extend to claims for which plaintiffs produce no evidence, *Rivera v. City of Wichita Falls*, 665 F.2d 531, 536 n.6 (5th Cir. 1982), the district court would have been justified in refusing to consider the claim of post-clause discrimination. Thus, if plaintiffs are correct in their assertion as to when the clause was eliminated, the only way they could be entitled to a finding on post-clause discrimination would be by petitioning the court to reopen the case, which they have not done.

On the other hand, if the clause were eliminated during the trial, plaintiffs' failure to request a ruling

would not constitute a waiver of the claim. Plaintiffs claimed that defendants were guilty of allocating grain work in a descriminatory manner. The contract clause was offered as evidence of that practice. While plaintiffs certainly objected to the clause, the subject of their claim was the *practice* of discriminatory allocation, whatever its source, and the court's inquiry should have focused on the practice. By bringing such a claim, plaintiffs requested consideration of the issue of post-clause discrimination. An additional request would not have been necessary.

We believe both parties are partially correct in their statements as to when the clause was deleted. The trial took place from July 22 to September 20, 1974, during the time that the Deep Sea Agreement was being renegotiated. The Agreement was to expire on September 30, 1974. By mid-September, it must have become painfully apparent that the grain clause was doomed, and as "a tactic of this litigation," *Williams v. NOSA*, 466 F.Supp. at 673, NOSA and Locals 1418 and 1419 decided to eliminate the clause from the new contract. But the new contract was not actually effective until October 1, 1974. So although it was agreed during the trial that the clause would be deleted, the action was not officially taken until after the trial ended.

Because the trial court was aware of the imminent elimination of the clause, we find that the issue was before it and should have been considered. At the close of the trial, however, plaintiffs had produced no evidence on the issue. In subsequent affidavits submitted on a summary judgment motion, plaintiffs offered evidence showing that the discriminatory practice continued notwithstanding the elimination of the clause. Defendants responded with counter-affidavits. When plaintiffs moved for reconsideration of the grain issue in 1979, their supporting memorandum noted the conflicting affidavits and insisted that the issue could not be resolved without an evidentiary hearing.

The trial court granted plaintiffs' motion for re-

consideration of the grain issue. But, without another hearing and relying only upon the evidence adduced at trial five years earlier, the court reiterated its former holding that the proper comparison was between blacks and whites in the entire industry. This conclusion foreclosed a decision on post-clause discrimination in grain work. The grain work issue was not mentioned despite the fact that plaintiffs brought to the court's attention the conflicting affidavits. The court, however, would consider only the industry-wide claim.

Plaintiffs are entitled to a hearing on the issue of post-clause discrimination. We remand this issue to the district court so that all parties may present evidence as to whether or not discrimination continued after the 50-50 clause was deleted.

III. DECK AND WHARF JOBS

A. The Prima Facie Case

Next, plaintiffs claim that the court below erred in refusing to find discrimination in the assignment to deck and wharf positions in integrated general cargo gangs. General cargo gangs are comprised of sixteen members, eight of whom work in the hold of the ship while the other eight work on the deck or wharf. Deck and wharf jobs are regarded by all as more desirable than hold positions because the work is less physically demanding and permits the longshoreman to be out in the fresh air rather than confined to the bowels of the ship.

Job assignments are made by gang foremen. During the relevant time period, gangs were either all black or integrated. Black gangs had either black or white foremen, while integrated gangs always had white foremen. Plaintiffs alleged discrimination by white foremen in the assignment of the preferred positions in integrated gangs. They offered statistical proof of this and argue that they met their prima facie burden of proof and that defendants' rebuttal evidence was insufficient.

Again, we are faced with a dispute over the proper statistical analysis. Plaintiffs contend that the only

relevant statistics are those reflecting assignments within integrated gangs, all of which were overseen by white foremen. Defendants argue that such an analysis ignores 40-45% of all general cargo workers and in doing so penalizes those companies which have promoted blacks to foreman positions or have given all their general cargo work to black longshoremen. The district court agreed with defendants and examined the situation of all genral cargo workers in making its findings.

We find plaintiffs' focus to be the proper one. Although it excluded over 40% of the general cargo workers, many of whom were black, it did so because those statistics were irrelevant to the issue. Plaintiffs alleged racially discriminatory assignments. Unless a gang was integrated, racial discrimination within the gang was impossible. Therefore, the proper analysis includes only integrated gangs. And, because integrated gangs always had white foremen, the analysis must exclude gangs with black foremen.

Plaintiffs produced statistics showing that in 1972 and 1973, whites in integrated gangs were twice as likely as blacks to be assigned to deck and wharf jobs.[15] In 1972, blacks made up 82% of the integrated

15. Statistics for 12 NOSA Companies, 1972-73

1972:	WHITE	BLACK	TOTAL
Number in integrated general cargo gangs	194	884	1078
% in integrated general cargo gangs	18%	82%	100%
Number in deck and wharf jobs	162	340	502
% in deck and wharf jobs	32%	68%	100%

$$\text{Number of S/D} = \frac{340 - (502)(.82)}{\sqrt{(502)(.82)(.18)}} = 8.33$$

1973:	WHITE	BLACK	TOTAL
Number in integrated general cargo gangs	220	885	1105

1973:	WHITE	BLACK	TOTAL
% in integrated general cargo gangs	20%	80%	100%
Number in deck and wharf jobs	196	341	537
% in deck and wharf jobs	36%	64%	100%

$$\text{Number of S/D} = \frac{347 - (537)(.80)}{\sqrt{(537)(.80)(.20)}} = -8.9$$

general cargo gang population but held only 68% of the deck and wharf jobs producing a variance of 8.3 standard deviations. In 1973, blacks comprised 80% of the population but held only 63% of the preferred jobs, producing a variance of 8.9 standard deviations.[16]

Plaintiffs' statistics revealed gross disparities giving rise to an inference of purposeful discrimination. *Hazelwood,* 433 U.S. at 307—08, 97 S.Ct. at 2741. The burden then fell to defendants to rebut this evidence.

B. The Defendants' Rebuttal

Defendants contend that assignments to deck and wharf jobs were made on the basis of gang longevity and individual skill without regard to race. The district court accepted this contention and based its finding of nondiscrimination on those factors. Plaintiffs argue that the court erred in making this finding and that its conclusion was actually based upon its belief that there was a "trend of a steady movement of black longshoremen into 'preferred' work . . ." *Williams v. NOSA,* 466 F.Supp. at 675—76.

We must disagree with plaintiffs on both assertions. First, we interpret the courts' language concerning the "trend" to mean that despite pre-Title VII discrimination,[17] defendants' assignment system permitted blacks to make great strides in general cargo gangs. The court ruled against plaintiffs because defendants' assignment system was legitimate and reasonable explanation for the disparities as well as the catalyst for the upward movement apparent in the statistics, and not because the strides negated any ex-

16. Even if we accept defendants' contention that *all* general cargo gangs must be included in the analysis, the figures still favor plaintiffs. For example, in 1973, blacks comprised 87.6% of the general cargo gang population but held only 673 of the 869 deck and wharf jobs, producing a variance of 8.3 standard deviations.

17. At trial, it was established that prior to the enactment of Title VII, blacks automatically were relegated to hold positions and whites to the deck and wharf.

isting discrimination.

Plaintiffs contest the district court's reliance on the seniority-based assignment system not because such a system violates Title VII or § 1981,[18] but because defendants allegedly failed to prove its existence. Again, we disagree.

At trial, both sides presented evidence concerning the assignment system. Several witnesses, including class representative Richard, testified that there was a custom or practice[19] of filling openings in the preferred deck and wharf jobs with the most senior member in the hold, provided he had the requisite skills. There was testimony by defense witnesses recounting various incidents where this custom was enforced, and contradictory testimony by some plaintiffs' witnesses concerning promotions without regard to gang tenure.

The district court was justified in concluding that there was a custom or practice of making assignments on the basis of seniority. In fact, plaintiffs' witness so

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18. 42 U.S.C. § 2000e—2(h) provides as follows:

> Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . .system, . . .provided that such differences are not the result of an intention to discriminate because of race . . .

Prior to the enactment of Title VII, there was discrimination in work assignments. Although Title VII prohibits the continuation of such a practice, this provision has been interpreted to permit assignments based upon an otherwise fair seniority system even if that system perpetuates the effects of pre-Title VII discrimination. *Teamsters*, 431 U.S. at 345-356, 97 S.Ct. at 1859-1865. A bona fide seniority system is also a defense to § 1981 claim. *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1118 (5th Cir. 1981); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 l.Ed.2d 74 (1979).

19. In most cases, the terms of a seniority system are contained in the contract negotiated between the employer and the union, *e.g., Teamsters, supra;* however, there is nothing in Title VII, its legislative history, nor the *Teamsters* case to indicate that a system unilaterally adopted by the employer can not be bona fide. *E.E.O.C. v. E.I. du Pont de Nemours & Co.*, 445 F.Supp. 223, 248 (D.Del. 1978). The same is true of a system which is not embodied in a written document. That the terms of the system are not in writing may go to the force of the proof necessary to establish its existence, but that fact does not render the system automatically invalid. In the instant case, defendants succeeded in proving the existence and bona fides of the system through the testimony of witnesses, including one of the plaintiffs, despite the fact that there was no written evidence of the system.

testified. The fact that the system occasionally was disregarded does not render it invalid. Because plaintiffs alleged a pattern or practice of discriminatory assignments, they had to "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Teamsters,* 431 U.S. at 336, 97 S.Ct. at 1855.

Defendants rebutted plaintiffs' prima facie case with more than mere "affirmations of good faith," *Alexander v. Louisiana,* 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972). They produced evidence, including evidence from one of plaintiffs' own witnesses, proving that assignments were made according to gang longevity and individual skill.

The record amply supports the district court's conclusion that job assignments within general cargo gangs were made on the basis of seniority and skill. Prior to Title VII's enactment, virtually no blacks were in the preferred positions. Since then, however, the figures indicate that blacks have been moving rapidly into deck and wharf jobs. Plaintiffs' exhibits showing that as of 1973, 63% of all deck and wharf jobs were performed by blacks illustrate the effectiveness of the system. If this trend continues, by the time this appeal is resolved, blacks may have overcome completely the final vestiges of pre-Title VII discrimination even though seniority is applicable.

Although we disagree with some of the court's statistical analysis, we affirm its finding on the ultimate issue of discriminatory assignments.

IV. CLASS CERTIFICATION

Plaintiffs brought this suit as a class action pursuant to Fed.R.Civ.P. 23. The district court denied a pre-trial motion by defendants to dismiss the class claims and allowed the case to proceed as a class action. Ultimately, class certification was denied on the ground that the proposed class lacked the requisite numerosity, and in the alternative, that plaintiffs fail-

ed to prove discrimination against any group of employees similarly situated.[20]

We find that the court erred in refusing to certify a class with respect to the grain claim but properly refused certification for the deck and wharf claim.

A. The Grain Claim

In pressing this claim, plaintiffs sought to represent all blacks who were denied opportunities to work in grain gangs because of defendants' discriminatory practices. This would include all those who actually sought grain work but were refused the opportunity, those who had been deterred from trying to get grain work because of knowledge of the discriminatory policy, and those who would become subject to this practice in the future. *Phillips v. Joint Legislative Committee on Performance & Expenditure Review*, 637 F.2d 1014, 1022 (5th Cir. 1981). During the relevant time period, there were hundreds of blacks working in the Port of New Orleans any or all of whom might have been affected by the discrimination.

In determining whether a proposed class is sufficienctly numerous, the court's inquiry must focus upon the practicability of joining all aggrieved parties. Here, an accurate count of all those aggrieved is virtually impossible, much less an identification of the actual persons. In these circumstances, joinder is certainly impossible, *id.* at 1022; *Jack v. American Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974), and because of this impossibility, the numerosity requirement is met.

The court relied upon *Bailey v. Ryan Stevedoring Co.*, 528 F.2d 551 (5th Cir. 1976), *cert. denied*, 429 U.S.

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20. Defendants also argue that the named plaintiffs may not represent the class because none testified that he sought work in a grain gang or was denied a deck or wharf position. The Pre-Trial Order, however, refutes this contention. At least one of the named plaintiffs claimed to be a victim of each type of discrimination alleged in this appeal. That they did not prevail on their individual claims does not render them inappropriate representatives. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969).

1052, 97 S.Ct. 767, 50 L.Ed.2d 769 (1977), in concluding that most of the black longshoremen plaintiffs sought to represent did not want to be included in the class. This case is distinguishable from *Bailey*, however. There we denied certification because a majority of the members of the proposed class petitioned the court to be excluded from the class. In this case, there was no such action by black longshoremen. The court referred to its awareness of the black Local's resistence to and resentment of the merger of the segregated locals. Whether members of the black Local were in favor of or opposed to union merger is irrelevant because our concern in this appeal is with the issues of discrimination in grain work allocation. Furthermore, the resistence relied upon by the court is a far cry from the unequivocal message contained in the *Bailey* class members' petition.

The court held, in the alternative, that certification was inappropriate because discrimination had not been proved. Because we have found discrimination in the allocation of grain work, this basis for the court's denial of certification is no longer valid.[21]

B. Deck and Wharf Claims

For the reasons just stated, we find that plaintiffs met the numerosity requirement. We affirm the court's denial of certification, however, on the alternative ground that no discrimination was proved, as set out above.

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21. Defendants interpret the court's alternative ground as meaning that certification was denied because there was no similarly situated group of employees who could have been discriminated against. They argue that the casual employment relationship between the stevedores and their employees coupled with the manifold personal factors involved in the determination of positions renders the proposed class too differentiated. We disagree with this interpretation. Our understanding of the court's opinion is that certification was denied because plaintiffs lost on the merits, not because a finding of discrimination was impossible by virtue of the nature of the industry. Furthermore, even if we accepted defendants' interpretation, we would reject its rationale. As we have already held, the nature of the industry does not shield it from charges of discrimination.

V. CONCLUSION

Plaintiffs proved that defendants engaged in purposeful discrimination against black longshoremen in the allocation of grain work through July of 1974. We certify the plaintiff class to consist of all registered black longshoremen who were eligible for grain work during the relevant time period. This includes all those who sought grain work but were refused as well as those who were deterred from seeking grain work because of the discriminatory allocation. This class is certified for purposes of this claim, and we remand the cause to the district court to determine the appropriate relief for discrimination through July of 1974 as well as the defendants' liability, if any, for post-July, 1974 discrimination. We affirm the district court's finding that there was no racial discrimination in assignments within general cargo gangs, and its denial of class certification with respect to this class.

AFFIRMED in part, REVERSED in part and REMANDED.

APPENDIX F

George James WILLIAMS, et al
Plaintiffs-Appellants

v.

NEW ORLEANS STEAMSHIP ASSOCIATION, et al., Defendants-Appellees

No. 80-3886

United States Court of Appeals
Fifth Circuit

October 8, 1982

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion April 9, 5th Cir., 1982, 673 F.2d 742)

Before THORNBERRY, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge.

The petitions for rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Fed. R. App.; Local Fifth Circuit Rule 16) the suggestions for rehearing en banc are DENIED.

I.Segmented Claim a Question of Law

In denying the motions for rehearing and the suggestions for rehearing en banc, the Court believes that there is value in commenting upon the issues urged upon the Court by the parties filing the petitions and the suggestions. This is particularly so with respect to the matter constituting the major emphasis of the assertions made. After the decision of the Court in this case, 673 F.2d 742 (5th Cir. 1982), the Supreme Court decided the case of *Pullman-Standard v. Swint*, — U.S. —, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). *Swint* was an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The Supreme Court reversed our decision, *Swint v. Pullman-Standard*, 539 F.2d 77 (5th cir. 1976), holding that a Court of Appeals is bound by the "clearly erroneous" rule of Fed. R. Civ. Proc. 52(a) in reviewing a district court's finding of fact whether or not the finding of fact is classified as an "ultimate

fact." The Court made it clear, however, that in applying the clearly erroneous standard to the review of all findings of fact, it was not changing the standard with respect to the review of conclusions of law. The opinion of the Court said "The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." This is precisely the situation involved in the case sub judice.

We held that our review of the district court's finding that there had not been racial discrimination was not bound by the clearly erroneous standard because it was based upon an erroneous view of the law concerning the legal validity of segmented claims. When the plaintiffs presented their grain work claim to the court, they argued that there was discrimination with respect to grain work which was distinct from other discrimination allegedly existing in the industry. The court refused to accept the claim, however, and instead converted the claim into one of industry-wide discrimination. The district court never addressed the issue of whether grain work was factually a distinct and separate category. The only statement made by the court in which its reason for rejecting the segmented claim is shown was in the minute entry of June 30, 1980, which stated, "Since he (the longshoreman) may work various types of cargo at different hours in any given week, the important thing is how he fares overall." This statement was unequivocally a statement of the law of the case and not of particular facts found.

The manner in which the district court handled plaintiffs' segmented claim was the equivalent of a dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Rather than dismiss the claim altogether, however, the court allowed the plaintiffs to try the broader claim that black longshoremen in the entire industry suffered economically as a result of alleged discrimination in this one job category. This change in the nature of the plaintiffs' claim was based entirely on the decision of the district judge that the law required that the issue of

discrimination in grain work not be separately cognizable. We found this to be an error in law which is not limited to the clearly erroneous standard of review.

The *Swint* case is not implicated by this Court's opinion. We did not distinguish between ultimate and subsidiary facts, we did not even make mention of such a distinction; we did not review mixed questions of law and fact; and we did not suggest that ultimate findings might be synonymous with legal conclusions and therefore reviewable free of the clearly erroneous standard.

Our holding that the court operated under an erroneous view of the law raises the question of whether our conclusion that the question is one of law is correct. Petitioners contend that the inquiry into whether a job category constitutes an entity with distinct and separate characteristics is a question of fact. We are in full agreement with this assertion. Had the district court found that grain work was factually indistinguishable from other jobs we would be bound by that conclusion unless clearly erroneous. The district court did not make this finding, however. It presumed that *even if* grain work was distinct and different from other work, a claim alleging discrimination in that area only would not be cognizable. This was clearly a legal conclusion. Thus, *Swint* does not in any way trench upon our holdings in this case.

II. Grain Work as a Separate Job Category

Petitioners also again challenge our conclusion that the grain work is a separate job category. As to the unique aspects of grain work, little can be added to our opinion. The petitioners obviously focus upon the fact that most longshoremen perform a variety of longshoring jobs and that grain work is simply one of those jobs. If the problem, however, is approached from the standpoint of the job rather than those who fill it, the distinctive nature of grain work is readily apparent. The parties recognized this themselves when they made a

separate contract overtly setting a racial quota for grain work. Grain work is recognized as different in other ways. For example, the contract provided for an independently negotiated rate for grain work which was 20¢ per hour higher than the general hourly rate.

If we were not to view grain work as separable, we would be allowing a union and employer association openly to discriminate by contract on the basis of race so long as the industry-wide effects from other jobs tended to equalize or cancel out the discrimination. There is no authority whatsoever in the law to justify such open and blatant racial discrimination in a job which the parties themselves treat as separate from others.

The cases which the parties urge do not alter this conclusion. The leading case of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), involved two separate classifications of drivers, line drivers and city drivers. Each employee was either a line driver or a city driver, but not both. We stress that we did not rely upon *Teamsters* on the issue of separability. In fact the Supreme Court itself in that case did not even mention the problem of separability. It just assumed that the employer work force was separable. We cited the case only as proof of the fact that separability is valid within an employer's cadre of employees or an industry, and also as an example of a successful segmented suit. It is obvious that the operation of the trucking industry renders it more susceptible to segmented claims than does the operation of the longshoring industry. It does not undermine the basic principle, however, that an employer is forbidden to discriminate in one or more jobs in the company regardless of the overall facade of non-discrimination.

Both *Swint v. Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976), and *EEOC v. Datapoint Corp.*, 570 F.2d 1264 (5th Cir. 1978), are cases in which the plaintiffs complained of discrimination throughout a particular plant or a particular workforce. In both of the cases the

plaintiffs offered statistical evidence showing racial imbalances in small segments of the employers' workforce. We only concluded that the segmented evidence was meaningless and inadequate because the plaintiffs had lodged employer-wide claims. Those two cases are close to being the opposites of this case.

We must, therefore, reaffirm our conclusion that a separate claim of racial discrimination with respect to the grain work was legally authorized under Title VII and 42 U.S.C. § 1981 and that the district court in not allowing the separate claim made an error in law.

III. Class Representation

Petitioners also challenge the adequacy of class representation. As stated in footnote 20 of our opinion, there was at least the allegation that one of the named individuals had been a grain worker or had sought grain work. The district court's opinion, 466 F.Supp. 662, 671 (E.D. La. 1979), refers to John Aaron's position as a grain worker. The district court refused to certify a plaintiff class because of lack of numerosity and failure to prove discrimination overall. The court did not find that named plaintiffs were in any way inadequate to represent a class of grain workers.

The petitioners complaint is that none of the individuals actually testified at trial that they had personally suffered from discrimination in the allocation of grain work. This, it is argued, leads to the conclusion that they were inadequate representatives. In the first place it must be remembered that the case was tried on the basis of proving overall discrimination, not discrimination in grain work. Second, plaintiffs introduced statistical evidence showing the effects of grain work discrimination on themselves and the class.

It must be concluded that, in a major sense, the district court by its rulings cut off the development of specific testimony to isolate particular people as having engaged in grain work. The record is quite clear, by implication however, and indeed by the very argument

which the plaintiffs make in trying to say that grain work is not separable, that many of the longshoremen at the New Orleans port have worked in grain gangs, and can serve as adequate class representatives of a class limited to challenging discrimination in grain work.

IV. Finding of Racial Discrimination in Grain Work

Petitioners also challenge the propriety of deciding the merits of the grain work claim rather than remanding it once we found the separate claim valid. *Swint* holds that "where findings are infirm because of an erroneous view of law, a remand is the proper course unless the record permits only one resolution of the factual issue." 102 S.Ct. at 1792 (emphasis added). This is simply a reaffirmation of a long standing rule of which we were well aware in reaching our decision. A review of the record, particularly the statistics and the overtly discriminatory contract provision, convinced us that there was only one possible resolution of the issue. The evidence shows unmistakably that defendants discriminated purposefully and with a precise quota system on the basis of race in the allocation of grain work. A remand on that issue would be a waste of time.

The conclusion does not mean that there are automatically high awards of back pay available. Proof of discrimination in a class action establishes a presumption that each class member has experienced discrimination, but it does not mean that each member is entitled to back pay. To obtain a back pay award, each claimant must show (I) he or she is a member of the class; (II) that he or she was a "potential" victim of the discrimination (that he or she sought and was refused grain work or would have sought grain work but for the discriminatory practice); and (III) the factual basis for computing the back pay award. *See* C. Sullivan, M. Zimmer, & R. Richards, Federal Statutory Law of Employment Discrimination Section 9.1, pp. 516-519

(1980). The burden will be on each longshoreman to prove the particular economic loss. The record contains employment records from most of the stevedores, but the longshoremen will have to prove that he or she lost wages because of being kept out of grain work, and prove the amount of wages lost. A district court has broad discretion in conducting the so-called "Stage II" proceeding, and it is the province of the district court to formulate the remedies.

V. Continuing Discrimination in Grain Work

Finally, petitioners question the propriety of our reaching the issue of discrimination in grain work after the clause was deleted from the contract. The deletion in the contract took place about two months after the trial was concluded on September 20, 1974. It is not argued that the alleged post-clause discrimination was as matter of time beyond the scope of the claim, only that it was substantively different. However, plaintiffs original complaint was directed at the *practice* of discriminatory allocation of grain work whatever its source. The fact that the clause compelling discrimination had been deleted, standing alone, did not automatically dissolve the claim. The date that the trial was concluded is not the significant date with respect to these claims. It was nearly five years after the trial before the court issued its first opinion in the case. During those five years, motions, briefs, and evidence were submitted to the court. After the court rendered its initial opinion in 1979, it reopened the grain issue and accepted more evidence and memoranda. Plaintiffs continued to submit evidence showing that discrimination still existed in spite of the deletion of the clause, and they asked for a hearing on the issue.

Until the trial court issued its final order in 1979, it retained jurisdiction over the case and obviously was entitled to order a remedy which would solve the problem once and for all. The court could have ordered post-clause relief in its original order in 1979. But in

any event it was entitled to do so in 1980 when it reopened the grain issue. At that time, the plaintiffs submitted evidence showing that the elimination of the clause had not cured the discrimination. The issue was squarely before the court. The court refused the make post-clause findings, however, because it still was in error in finding that a segmented claim was not authorized by law.

Petitioners' further assertion that the post-clause discrimination was not properly before the court because it was not subject to an EEOC charge cannot be accepted. Plaintiffs' original EEOC charge concerned the *practice* of racial discrimination in grain work, not just the existence of the grain clause. The EEOC charge, therefore, covered any racial discrimination in grain work, regardless of its source, occurring from 180 days before the charge was filed until the discrimination ended. Petitioners' reliance on *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), is not persuasive. In that case the EEOC complaint involved charged only sex discrimination. We held that such a charge could not serve as the basis of a Title VII claim charging racial and national origin discrimination.

Finally, on this point, we remind petitioners that plaintiffs also alleged violation of 42 U.S.C. § 1981. Even if the lack of an EEOC charge were relevant, and we find it is not, the plaintiffs still would be entitled to relief under § 1981 if they can establish individual claims.

Petitions for rehearing DENIED and suggestions for rehearing en banc DENIED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-1129

NEW ORLEANS STEAMSHIP ASSOCIATION,

Petitioner

VERSUS

GEORGE WILLIAMS, ET AL

Respondents.

SUPPLEMENTAL APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

In accord with Rule 28.1 of the Supreme Court Rules, the following is a statement of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each corporation on whose behalf the undersigned counsel has petitioned for certiorari:

1. *Atlantic and Gulf Stevedores, Inc.* is wholly owned by John W. McGrath Corporation which, in

turn, is wholly owned by McGrath Services Corporation. Affiliates are Atlantic & Gulf Grain Associates, Inc. and Gulf & Southern Terminals, Inc. Additionally, Atlantic & Gulf Stevedores, Inc. owns stock in New Orleans Marine Contractors and in Baton Rouge Marine Contractors.

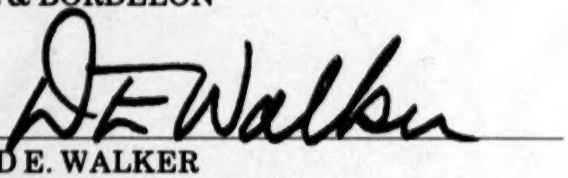
2. *Cooper Stevedoring of Louisiana, Inc.* is wholly owned by Cooper Stevedoring Company, Inc. It has no subsidiaries and no affiliates.
3. *Dixie Stevedores, Inc.* is wholly owned by Norton, Lilly & Co., Inc. It is also a 50% owner of Southern Marine Terminals, Inc.
4. *J.P. Florio and Co., Inc.* is no longer in business. The name of the company was changed to TTT Stevedores of La., Inc. and then to Coastwide Marine Services of La., Inc. The holding company for J.P. Florio and its successors is the Lansk Corporation. On information and belief, the entire operation is in bankruptcy.
5. *Gulf Stevedore Corporation* is wholly owned by Hansen & Tidemann, Inc.
6. *Louisiana Stevedores, Inc.* is no longer in business. When operating, it was wholly owned by Dalton Steamship Corporation.
7. *Lykes Bros. Steamship Co., Inc.* is presently wholly owned by LTV Corporation; however sale by LTV is pending.
8. *Mid-Gulf Stevedores, Inc.* is no longer in business. When operating, it was wholly owned by Central Gulf Lines, Inc.
9. *New Orleans Stevedoring Company* is wholly owned by James J. Flannagen Shipping Corporation which in turn is wholly owned by Port Arthur Shipping Corporation.
10. *Rogers Terminal and Shipping Corporation* is wholly owned by Cargill, Inc.
11. *Ryan-Walsh Stevedoring Co., Inc.* is wholly owned by Dravo Corporation. Its affiliates are: Stevedores Incorporated; Wilmington, N. Carolina (more than 50%, less than 80% interest); Capitol

City Stevedoring, Baton Rouge (less than 50% interest); Delta Bulk Terminals, Inc. (less than 50% interest).

12. *T. Smith & Son, Inc.* is wholly owned by Southern Harbor & Towing, Inc.

Submitted this the 14th day of January, 1983.

WALKER & BORDELON

By: 

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEW ORLEANS STEAMSHIP ASSOCIATION,
Petitioner
v.
GEORGE WILLIAMS, ET AL.,
Respondents

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL.,
Petitioners
v.
GEORGE WILLIAMS, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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OPPOSITION ON BEHALF OF RESPONDENTS TO PETITIONS FOR A WRIT OF CERTIORARI

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Dated: February 16, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. The available longshore work force on the New Orleans waterfront is 75% black and 25% white. The employers and the unions entered into an express agreement to divide premium grain cargo work 50-50 between blacks and whites. The question presented is whether the division of grain cargo work according to this agreement violates rights secured by Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, without regard to the ability of black longshoremen to secure other work on the waterfront?

2. Whether the disposition of this case in the court of appeals is consistent with Rule 52(a) of the Federal Rules of Civil Procedure?

3. Whether the named plaintiffs, black longshoremen on the New Orleans waterfront, may properly represent a class of similarly situated black longshoremen on the New Orleans waterfront in challenging the racial division of grain cargo work?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Statement of the Case	1
Summary of the Argument	8
Reasons Why the Writ Should Not Be Granted	9
1. The Substantive Question Presented is Controlled by this Court's Decision in *State of Connecticut v. Teal*	9
2. There is No Question Under Rule 52 in this Case and No Reason to Remand	11
3. The Class Certification in this Case Raises No Issue Warranting Review by this Court	14
Conclusion	17

TABLE OF AUTHORITIES

CASES: Page

Califano v. Yamasaki, 442 U.S. 682 (1979) 16
East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977) 15-16
EEOC v. Datapoint Corp., 570 F.2d 1264 (5th Cir. 1976) 14
General Telephone Co. v. Falcon, 102 S. Ct. 2364 (1982) 15-16
Pullman-Standard Co. v. Swint, 102 S. Ct. 1781 (1982) 8, 11-13
State of Connecticut v. Teal, 102 S. Ct. 2525 (1982) 1, 8, 9-11
Swint v. Pullman-Standard Co., 539 F.2d 77 (5th Cir. 1976) 14
Williams v. New Orleans Steamship Ass'n, 466 F. Supp. 662 (E.D. La. 1979), *aff'd in part, rev'd in part*, 673 F.2d 742 (5th Cir.), *reh. denied*, 688 F.2d 412 (5th Cir. 1982) ..... *passim*

STATUTES AND RULES:

Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e *et seq.* 7, 8, 9, 11
Civil Rights Act of 1866, Section 1, 42 U.S.C. § 1981 ..... 7, 8, 9
Rule 23, Federal Rules of Civil Procedure 9, 16
Rule 52(a), Federal Rules of Civil Procedure 9, 11

IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

OPPOSITION ON BEHALF OF RESPONDENTS TO PETITIONS FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitions do not make clear what this case is about. At issue is the legality of the division of grain cargo work on the New Orleans waterfront on a 50-50 racial basis, although the available work force is 75% black and 25% white. Until after the trial of this case, this racial division was explicitly required by the terms of the collective bargaining agreement among the Petitioners. Without benefit of a citation to this Court's decision in *State of Connecticut v. Teal*, 102 S. Ct. 2525

(1982), the Petitioners attempt to defend this "open and blatant racial discrimination," *Williams v. New Orleans Steamship Ass'n*, 688 F.2d 412, 415 (5th Cir. 1982), on the basis of a "bottom line" theory, contending that blacks secure enough other work on the New Orleans waterfront to overcome the discrimination in grain work.

The undisputed facts are these:

For many years, the active longshoremen on the New Orleans waterfront have been 75% black and 25% white.[1] For the sole purpose of racially segregating the work force, petitioner International Longshoremen's Association (ILA) chartered two separate longshore locals with the identical jurisdiction. Local 1418 was the local for whites and Local 1419 was the local for blacks.[2] This condition existed until 1980 when the district court in this case ordered a merger of the Locals, ILA App. at 44, and a stay of this Order was refused by both the district court and the court of appeals.

Grain cargo work involves loading of grain onto ships. In the modern era, this function is performed by machines which pump the grain from containers directly into the ship's hold. Because of the relative automation of the task, grain cargo gangs on the New Orleans waterfront, under the terms of the labor agreement, are made up of eight men, rather than sixteen, as are employed for general cargo work. 466 F. Supp. at 665, 673, ILA App. at 5, 20-21. ". . . [W]ork in grain cargo is easier

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[1] *Williams v. New Orleans Steamship Association*, 466 F. Supp. 662, 667 (E.D. La. 1979), *aff'd in part, rev'd in part*, 673 F.2d 742 (5th Cir.), *reh. denied*, 688 F.2d 412 (5th Cir. 1982), Appendix to ILA Petition (hereafter "ILA App.") at 7-8; NOSA Petition, p. 10; ILA Petition, pp. 7-8.

[2] The parties stipulated that "Local 1418 has an active membership of approximately 750, 744 of whom are white. Local 1419 has an active membership of approximately 3,608, of whom all are black." 466 F. Supp. at 665, ILA App. at 5.

and better paying than other general longshore work, there being a 20 cent per hour premium for such work." 466 F. Supp. at 673, ILA App. at 21. The total grain cargo payroll on the New Orleans waterfront for the three years preceding trial was almost $8 million dollars.[3]

This case was filed in 1971 and tried in the summer of 1974. For many years and until after the trial of the case, the collective bargaining agreement between the unions and the employers contained a clause providing as follows:

> So far as is practical, work is to be divided between members of ILA Locals 1418 and 1419 in grain trimming machine gangs, and/or trimming gangs.

466 F. Supp. at 673, ILA App. at 20. In the words of the district court, "[i]n practice, this meant that grain crews were to be half white and half black, assuming that sufficient longshoremen of both races were available, even though the active black local membership was more than three times greater than the white." 466 F. Supp. at 673, ILA App. at 20-21.[4]

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[3] See note 5, *infra*.

[4] The language requiring the 50-50 division of grain cargo work was deleted from the labor agreement by the petitioners, effective October 1, 1974—a few days after the conclusion of the trial. 466 F. Supp. at 673, ILA App. at 21. In the district court, plaintiffs contended that the deletion of the contract language did not result in any change in the 50-50 racial division and submitted an affidavit to that effect. Contradictory affidavits were filed by the defendants, but no hearing was ever held on this question. See 673 F.2d at 752, ILA App. at 64. It was not addressed by the district court because of its ruling that the racial division was not illegal .

In its decision, the court of appeals held that:

> Plaintiffs are entitled to a hearing on the issue of post-clause discrimination. We remand this issue to the district court so that all parties may present evidence as to whether or not discrimination continued after the 50-50 clause was deleted.

673 F.2d at 752; ILA App. at 65. Trial in the district court on the issues defined by the court of appeals is scheduled to commence on May 2, 1983.

The plaintiffs' evidence showed, and there was no contest on the matter, that the racial grain clause had been faithfully complied with, and that, both in numbers of blacks and whites in regular grain gangs, and in number of payroll dollars paid to blacks and whites for grain work, the racial division was almost exactly 50-50.[5]

The defendants' defense, as reflected in the Petitions here, was twofold. *First*, they introduced evidence tending to show that the racial grain clause was adopted in the mid-50's at the insistence of the President of the black Local, who feared that worse discrimination would be practiced against black longshoremen in the selection of grain cargo gangs, unless one half of the work was reserved to blacks. 466 F. Supp. at 673, ILA App. 21. *Second*, defendants argued, based on sharply disputed statistical evidence, that even though blacks received less than their proportionate share of grain cargo work, they received enough other work on the New Orleans waterfront to make up for it.[6]

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[5] At trial, plaintiffs introduced ten exhibits, summarized in the Appendix to this Opposition, which showed the racial makeup of the regular grain gangs of the ten defendant companies employing regular grain cargo gangs. With isolated minor exceptions, the gangs were exactly half white and half black. Three additional exhibits, Pl. Exhs. 131, 132, and 133, showed the annual earnings from all grain cargo work (that performed by regular and non-regular grain gangs) of members of the white and black locals, for the three contract years prior to trial, as follows:

Contract Year	Grain Earnings of Local 1418 Members	Grain Earnings of Local 1419 Members	Local 1419 Earnings As a Percent of the Whole
1970-71	$ 989,644	$ 945,581	48.9%
1971-72	1,194,848	1,161,631	49.3%
1972-73	1,775,952	1,833,170	50.8%
Totals	$3,960,444	$3,940,382	49.9%

[6] Petitioner NOSA also argues in this Court that plaintiffs did not present discrimination in the allocation of grain cargo work as a

In its original decision on the merits, the district court found that the racial allocation of grain cargo work did not violate Title VII. In explaining this conclusion, the

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separate issue in the district court. NOSA Petition, pp. 13-16. This contention is clearly refuted by the record:

a. Plaintiffs' Amended Complaint, filed with leave of the court on May 3, 1973 (over a year before trial), stated in para. 19, p. 11:

* * * *

(v) Certain kinds of preferred and/or higher paying longshore work is artificially divided between the membership of the defendant local unions. Since the local unions are segregated by race, this practice constitutes a division of work between black and white longshoremen. The work of unloading and loading grain ships, which is preferred because it is less physically demanding than general cargo work and pays a higher hourly wage rate, is equally divided between the membership of defendant Locals 1418 and 1419. The grain crew is thus composed of an equal number of blacks and whites. . . . The equal division of grain work is specified in the collective bargaining agreement between NOSA and defendant Longshore Locals 1418 and 1419. . . . The division of work as described above discriminates against black longshoremen because they outnumber whites in the work force and thus receive a disproportionately small share of work.

b. The Pre-Trial Order in this case, signed by the district court and by all counsel and entered on July 12, 1974, in Part 6, p. 14, lists among "plaintiffs' class claims," the following:

(4) Racial Discrimination in Employment on Grain Gangs

(a) Plaintiffs contend that the following companies discriminate against black longshoremen by employing a disproportionately small number of black longshoremen for Grain Gangs:

Atlantic & Gulf Stevedores
J. P. Florio
Gulf Stevedores
Louisiana Stevedores
Lykes Brothers
Mid-Gulf Stevedores
Strachan Shipping
T. Smith & Son
J. Young & Company

Because employment on Grain Gangs is controlled by the Deep Sea Agreement between N.O.S.A. and Locals 1418 and 1419,

court relied primarily on the evidence concerning the origins of the clause.

> . . . [I]t was the former president of Local 1419 who insisted that the clause be inserted in the Deep Sea Agreement to protect his men and to see to it that they would get a "fair shake."

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plaintiffs also contend that these defendants also discriminate against black longshoremen as a class.

c. Plaintiffs' Trial Memorandum, submitted on July 22, 1974, at p. 3, included the following as item 5 in its "Summary of the Class Issues":

> 5. *Racial Discrimination in the Employment of Regular Grain Gangs.* Regular grain gangs are gangs that load and unload grain for a particular company. Under the collective bargaining agreement, this work is compensated at a higher rate than general cargo work. This contention is that there is racial discrimination in the employment of longshoremen for regular grain gangs. The collective bargaining agreement provides that one-half of these positions be accorded to members of ILA Local 1418 (white) and one-half to members of ILA Local 1419 (black). (1971-74 Deep Sea Agreement, p. 20, para. 3). Since seventy-five percent of the guarantee men on the waterfront are black, this clause is racially discriminatory. The primary statistical data that will be introduced in support of this contention are exhibits showing that regular grain gangs are one-half white and one-half black.

d. At trial, plaintiffs introduced thirteen separate statistical exhibits relating solely to the issue of racial discrimination in the allocation of grain cargo work. See note 5, *supra*, and the Appendix to this Opposition.

e. In its decision, the district court lists as one of plaintiffs' class claims for decision discrimination in the allocation of grain cargo work:

> In addition to the individual claims . . ., the following are the "class claims," . . . (4) racial discrimination in that various companies employ a disproportionately small number of black longshoremen for grain gangs; . . .

466 F. Supp. at 666, ILA App. p. 7.

At no time did the district court suggest that the issue of the legality of the racial division of grain work was not presented by the plaintiffs or decided by the Court.

466 F. Supp. at 673, ILA App. at 21. The district court added, however,

> This is not to say that we disagree with plaintiffs' position that the division of grain cargo work was discriminatory and that it was accomplished through a segregated union system. We also cannot disagree with plaintiffs, on the facts, that the removal of the contract language was a tactic in the litigation and in response to the dictates of Title VII. We are not prepared, at this point, to say that this suit was not the catalyst for the removal of the clause.

466 F. Supp. at 673-74, ILA App. at 21.

Because of the district court's statement that the division of grain work was discriminatory, plaintiffs filed a motion for reconsideration of the decision not to hold this division violative of Title VII and 42 U.S.C. Section 1981. In an opinion denying the motion for reconsideration, the district court adopted the defendants' "bottom line" theory:

> We agree with defendants that plaintiffs were unable to show that the overall work allocation in the longshore industry was disproportionate or inequitable and we think that such a showing is crucial to prove racial discrimination. No longshoreman works exclusively at one type of work. Since he may work various types of cargo at different hours in any given week, the important thing is how he fares overall. . . . There is no indication that the grain clause and the 20 cent differential created an overall discriminatory effect on the amount of money earned by black longshoremen. We think that the evidence as a whole established that blacks in the longshore industry receive their proportionate share of work and pay according to their numbers.

ILA App. at 40.[7]

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[7] In addition to challenging the validity of the bottom line defense, plaintiffs on appeal argued, alternatively, that the district court's

The court of appeals reversed and held that the racial division of grain work constituted a violation of Title VII and Section 1981, regardless of the overall earnings of black longshoremen. 673 F.2d 742 (5th Cir. 1982), ILA App. 47.

> Were we to accept defendants' contentions, we would be ruling in effect that an employer may discriminate with impunity as long as it confines such action to some units or departments within the work force while maintaining an overall facade of equality.

673 F.2d at 747, ILA App. at 55. These Petitions followed a denial of rehearing and rehearing *en banc*. 688 F.2d 412 (5th Cir. 1982), ILA App. 73.

SUMMARY OF THE ARGUMENT

It is stipulated that blacks constitute 75% of the available longshore work force on the New Orleans waterfront. There is also no dispute that grain cargo work is paid at a premium over general cargo work, that the employers and the unions (petitioners here) entered into an express agreement for the 50-50 division of grain cargo work between white and black longshoremen, and that this work was distributed in accordance with this agreement. On its face, this employment practice is racially discriminatory. The decision of this Court in *State of Connecticut v. Teal*, 102 S. Ct. 2525 (1982), makes clear that the practice cannot be defended on a "bottom line" theory by arguing that black longshore-

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statistical analysis was invalid, and that when the statistical data in evidence was properly analyzed it revealed that blacks overall did not receive a fair share of hours or earnings. In its opinion, the court of appeals agreed that the district court's statistical analysis was "flawed," for reasons explained in its opinion, 673 F.2d at 746, n. 7, ILA App. 53, n. 7, but, because of its disposition of the bottom line issue, the court of appeals did not further address this question. If the court of appeals' rejection of the bottom line defense were overturned for any reason, plaintiff would remain entitled to appellate consideration of this alternate contention.

men secure enough other work on the New Orleans waterfront to overcome the discrimination.

There is no issue under Rule 52(a) in this case. The court of appeals rendered its decision on an issue of law on essentially undisputed facts. No factual finding of the district court was overturned. In view of the express agreement to discriminate, the "record permits only one resolution of the factual issue" of intent to discriminate, *Pullman-Standard Co. v. Swint*, 102 S. Ct. 1781, 1792 (1982), and there was no occasion for a remand to the district court for further factfinding prior to a determination of liability.

The ruling of the court of appeals that the named plaintiffs properly represent a class on the grain cargo issue is consistent with the requirements of Rule 23 and is not inconsistent with any decision of this Court. Plaintiffs, as black longshoremen seeking work on the waterfront, are aggrieved by the racial restriction on grain cargo work in the same manner as the other black longshoremen that they represent. There is no suggestion that the plaintiffs were unqualified or ineligible for this work.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The Substantive Question Presented is Controlled by this Court's Decision in *State of Connecticut v. Teal.*

The fact of racial discrimination against blacks in the selection of grain cargo gangs is not subject to dispute. The issue is whether this discrimination is lawful under Title VII and Section 1981 because of other employment opportunities that are available to blacks on the New Orleans waterfront.

The decision of the court of appeals that other work opportunities cannot legitimize the discriminatory racial division of grain cargo work is plainly correct under this Court's decision in *State of Connecticut v. Teal*, 102

S. Ct. 2525 (1982), which was decided after the original decision in the court of appeals.

In *Teal*, the State administered a promotional examination that was shown to have a substantial disparate adverse impact on black employees. The State proved that despite the racial impact of the test, by virtue of its selections from among those who passed the test, the minority proportion of those promoted was higher than the minority proportion of those who applied for promotion. This Court rejected this defense:

> . . . The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the opportunity to compete equally with white workers on the basis of job-related criteria.
>
> * * * *
>
> It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.

102 S. Ct. at 2533, 2535. Similarly, here, the discriminatory allocation of grain cargo work denies individual black longshoremen the right to compete equally with whites for this work. This discrimination cannot be defended by showing that blacks as a group receive a fair share of all work on the New Orleans waterfront.[8]

The correctness of the decision of the court of appeals in this case is supported not only by the majority, but also by the dissent in *Teal*. Justice Powell, dissenting, agreed that a "bottom line" defense would be invalid in a disparate treatment case, but argued that when, as in

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[8] With respect to the overall earnings of class members, the court of appeals stated: "industry-wide earnings of blacks may be relevant on the issue of backpay. This evidence has no place in the liability phase, however." 673 F.2d at 751, ILA App. at 62.

Teal, a *prima facie* case is based solely on racial impact, the employer is entitled to show that overall there is no adverse racial impact. See *id.* at 2536-40.

This case is a disparate treatment case, not a disparate impact case. No racially neutral policy with disparate impact is involved. Rather, there is a facially discriminatory policy which excludes black longshoremen from certain jobs on account of their race. Thus, in *Teal*, all of the Justices of this Court subscribed to principles that sustain the decision of the court of appeals in this case.

No other decision is conceivable. The facts here are different only in degree from a hypothetical employer who announces that no blacks will be permitted to work in a particular job category, on a particular shift, or in a particular department, and then attempts to defend this policy on the ground that other employment opportunities available to blacks result in a nondiscriminatory "bottom line." The attempted defense is unavailing. Section 703 (a) (2) of Title VII, 42 U.S.C. § 2000e-2(a) (2), which makes it an unlawful employment practice for an employer to "limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . .", condemns racial allocation of work opportunities, particularly where the share allocated to minorities is below minority availability in the relevant labor pool.

2. There is No Question Under Rule 52 in this Case and No Reason to Remand.

The decision of the court of appeals is not inconsistent with the letter or spirit of this Court's decision in *Pullman-Standard Co. v. Swint*. As the court of appeals carefully explained in denying Petitions for Rehearing based on *Swint*, there are no factual questions subject to

reasonable dispute that are relevant to the court's determination.

> The Court [in *Swint*] made it clear . . . that in applying the clearly erroneous standard to the review of all findings of fact, it was not changing the standard with respect to the review of conclusions of law. The opinion of the Court said "The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." This is precisely the situation involved in the case sub judice.
>
> We held that our review of the district court's finding that there had not been racial discrimination was not bound by the clearly erroneous standard because it was based upon an erroneous view of the law concerning the legal validity of segmented claims. When the plaintiffs presented their grain work claim to the court, they argued that there was discrimination with respect to grain work which was distinct from other discrimination allegedly existing in the industry. . . . The only statement made by the court in which its reason for rejecting the segmented claim is shown was the minute entry of June 30, 1980, which stated, "Since he (the longshoreman) may work various types of cargo at different hours in any given week, the important thing is how he fares overall." This statement was unequivocally a statement of the law of the case and of particular facts found.
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> • • • •
>
> We found this to be an error in law which is not limited to the clearly erroneous standard of review.
>
> The *Swint* case is not implicated by this Court's opinion. We did not distinguish between ultimate and subsidiary facts, we did not even make mention of such a distinction; we did not review mixed questions of law and fact; and we did not suggest that ultimate findings might be synonymous with legal

> conclusions and therefore reviewable free of the clearly erroneous standard.

688 F.2d at 414-15, ILA App. at 75-76.

The court of appeals also addressed petitioners' argument, also made here, that upon finding that the issue of discrimination in grain cargo work should be decided without regard to the availability of other work on the New Orleans waterfront, the matter should be remanded to the district court for factual findings on the issue of discriminatory intent.

> Petitioners also challenge the propriety of deciding the merits of the grain work claim rather than remanding it once we found the separate claim valid. *Swint* holds that "where findings are infirm because of an erroneous view of law, a remand is the proper course *unless* the record permits only one resolution of the factual issue." 102 S.Ct. at 1792 (emphasis added). This is simply a reaffirmation of a long standing rule of which we were well aware in reaching our decision. A review of the record, particularly the statistics and the overtly discriminatory contract provision, convinced us that there was only one possible resolution to the issue. The evidence shows unmistakably that defendants discriminated purposefully and with a precise quota system on the basis of race in the allocation of grain work. A remand on that issue would be a waste of time.

688 F.2d at 416, ILA App. at 79.[9]

The Petitioners have also argued here that the court of appeals should have remanded to the district court for a determination of the "distinctiveness" of grain cargo work. The issue of "distinctiveness" does not control the disposition of this case. Grain cargo work exists. Millions of payroll dollars are spent on this work each year. It is paid at a higher rate than general cargo work

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[9] The district court did not find an absence of discriminatory intent, so there was no substitution of judgment in this case as there was in *Swint*.

under the applicable agreement. The Petitioners have openly agreed to exclude blacks from a proportionate share of this work and have done so. Nothing else is relevant to a finding of unlawful discrimination.[10]

3. The Class Certification in this Case Raises No Issue Warranting Review by this Court.

Three of the named plaintiffs, George Williams, Matthew D. Richard, and John T. Aaron, are black longshoremen on the New Orleans waterfront, who sought such longshore work as was available to them. As such, they are personally aggrieved by the racial division of grain cargo work, which artificially restricts the amount of this work that is made available to blacks.

In 1972, the district court ruled that a class action was proper, with plaintiffs serving as class representatives with respect to the grain cargo issue and all of the other issues raised by the Complaint. Discovery was conducted on a class-wide basis, and the case was tried as a class action for a total of nineteen trial days. Voluminous briefs on the class issues were filed by all parties.

Almost five years after trial, in its decision on the merits, the district court concluded that plaintiffs had failed to prove any of their claims against the employer

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[10] This is not a case where, in the absence of any direct evidence of an intent to discriminate, a plaintiff relies on statistical evidence relating to one or a few jobs among many in a workforce. See, e.g., *Swint v. Pullman-Standard Co.*, 539 F.2d 77, 94-95 (5th Cir. 1976); *EEOC v. Datapoint Corp.*, 570 F.2d 1264, 1269 (5th Cir. 1978). In such a case, it is a legitimate question whether statistics limited to a segment of the total picture can give rise to an inference of discrimination. No such question can exist, however, where, as here, there is an express agreement to discriminate in filling certain jobs.

defendants.[11] On this basis, and because of an asserted lack of numerosity,[12] the district court concluded that the case would not be treated as a class action, and that its decision would "not have any class application, . . ." 466 F. Supp. at 672, ILA App. 17-19.

In connection with its finding that the racial allocation of grain cargo work violates rights secured by Title VII and Section 1981, the court of appeals reversed the denial of class certification on this issue and certified a class, represented by the plaintiffs, composed of "all registered black longshoremen who were eligible for grain cargo work during the relevant time period." 673 F.2d at 756, ILA App. at 72. The case was remanded for the determination of an appropriate remedy.

This decision of the court of appeals is not inconsistent with the decision of this Court in either *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), or *General Telephone Co. v. Falcon*, 102 S. Ct. 2364 (1982). In *Rodriguez*, there had been no consideration of class certification in the district court. The plaintiffs stipulated that the only claims to be tried were their individual claims, and only their individual claims were tried. The trial resulted in a determination that the plaintiffs were not affected by the challenged employment practice because they were otherwise ineligible for the job in question. The court of appeals affirmed the lower court's de-

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[11] As noted, the segregated union claim against the union defendants was upheld by the district court.

[12] The court of appeals found that the district court's determination of lack of numerosity was in error because "[d]uring the relevant time period, there were hundreds of blacks working in the Port of New Orleans any or all of whom might have been affected by the discrimination." 673 F.2d at 755, ILA App. at 70. NOSA, in its Petition in this Court, does not challenge the resolution of the numerosity issue by the court of appeals.

termination of the individual claims, but then certified a class, with plaintiffs as class representatives, and found class-wide liability. This Court reversed, because "it was evident by the time the case reached [the court of appeals] that the named plaintiffs were not proper class representatives. . . . [P]laintiffs lacked the qualifications to be hired as line drivers. Thus, they could have suffered no injury as a result of the alleged discriminatory practice." 431 U.S. at 403-04. In *Falcon*, the Court emphasized the requirement of Rule 23 that the plaintiff's claim and the claims asserted on behalf of the class present common issues of fact and law, and held, in the absence of the identification of an employment practice affecting applicants and employees in the same way, that a plaintiff complaining of the denial of a promotion could not represent a class of unhired applicants.

Here, pursuant to a determination of the district court, the case was tried as a class action. There has been no finding that the named plaintiffs were in any sense ineligible for grain cargo work. Plaintiffs' injury from the racial division of grain cargo work is similar to the injury of every other black longshoreman. "Class relief is 'peculiarly appropriate' . . . [because] 'the issues involved are common to the class as a whole' . . . [and] 'turn on questions of law applicable in the same manner to each member of the class.' " *General Telephone Co. v. Falcon*, 102 S. Ct. at 2370, quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

Plaintiffs' challenge to the racial division of grain cargo work is the prototype of a proper class action. No class action question warranting review by this Court is remotely presented.

CONCLUSION

For the reasons stated, the Petitions should be denied.

Respectfully submitted,

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Dated: February 16, 1983

APPENDIX

MEMBERS OF REGULAR GRAIN GANGS, BY RACE TEN DEFENDANT COMPANIES, 1971-1973

	1971		1972		1973		
Company	Whites	Blacks	Whites	Blacks	Whites	Blacks	Source of Data
Atlantic Gulf	15	15	16	16	12	13	Pl. Exh. 101D
Florio	5	5	8	8	8	8	Pl. Exh. 104E
Gulf	6	7	4	4	4	4	Pl. Exh. 105B
Louisiana Stevedores	NA	NA	4	4	4	4	Pl. Exh. 106E
Rogers	5	5	4	4	4	4	Pl. Exh. 110C
T. Smith	NA	NA	16	16	16	16	Pl. Exh. 112E
Strachan	NA	NA	NA	NA	8	8	Pl. Exh. 113D
J. Young	NA	NA	7	10	7	10	Pl. Exh. 114D
Southern	NA	NA	4	4	4	4	Pl. Exh. 115A
Mid-Gulf	NA	NA	9	10	NA	NA	Pl. Exh. 108A

"NA" means not available.